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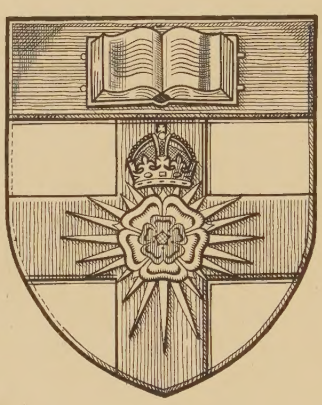

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* JACKSON.

C. A.
1886
May, 8, 10, 14.

[1883. N. 1187.]

Mortgage by Deposit—Priority as between Equities—Negligence.

On the 18th of January, 1883, *A.*, a solicitor, obtained from his sisters, *B.* and *C.*, their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 and payment to them of £300, they conveyed their shares of freehold property, which was subject to a mortgage to *K.*, to *A.* in fee. No money was at the time due from *B.* and *C.* to *A.*, nor was any payment whatever made to them. The deeds were not read over or explained to *B.* and *C.*, who had no idea that they were thereby conveying their property, and signed in full reliance on *A.*'s statement that he was going to clear off the mortgage and wanted to send the deeds to *K.*

On the next day *A.* deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, *A.* had told the managers that *B.* and *C.*, who were joint owners with himself of the property, were going to convey and "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which *A.* was interested. The manager handed over the deeds to the solicitor of the bank and merely told him that he was to exercise great care and diligence in investigating the title. The solicitor being dead, it did not appear what inquiries were made by him, but the advance was made to *A.*

A. having absconded, the property was claimed by the bank as equitable mortgagees, and the claim was resisted by *B.* and *C.* on the ground that the conveyances, having been obtained by fraud and misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by *A.* to *B.* and *C.*, of the 18th of January,

C. A.
1886
NATIONAL PROVINCIAL BANK OF ENGLAND v. JACKSON.

1883, which were attested but did not bear a seal, and which had only been discovered amongst *A.*'s papers after he absconded :—

Held, that inasmuch as *B.* and *C.*, though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of the 18th of January, 1883, were not void but voidable only. But as the statements made by *A.* to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud and to a refusal of the advance, and therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of *B.* and *C.*

The rule that the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence (see *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1)) does not apply as between two equitable claims :—

Held, also, that the absence of a seal from the deeds of reconveyance —there being no evidence that they had ever been sealed—rendered them invalid.

In re Sandilands (2) considered.

APPEAL from Vice-Chancellor *Bacon*.

Plaintiffs, as equitable mortgagees by memorandum and the deposit of the title deeds of twelve houses at *Plaistow*, given to them by *R. J. Jackson*, a solicitor, as security for an advance made to him, claimed by this action to enforce their security, and the claim was resisted by the Defendants, *Ann* and *Maria Jackson*, who were the sisters of *R. J. Jackson*, and asserted that they were still owners of the mortgaged property, and counterclaimed for a return of the title deeds. Under the will of *Robert Jackson*, their father, the Defendants and their brother, *R. J. Jackson*, were entitled, subject to the life interest of their mother, who died on the 19th of December, 1881, to the houses at *Plaistow*, which, as to seven of them (being those devised to *R. J. Jackson* and *Ann Jackson*) were subject to a mortgage for £700, created in testator's lifetime, and vested by assignment in 1871 in *J. King*, and also to a mortgage and further charge created by *R. J. Jackson* and *Maria Jackson*.

It appeared that in 1869 *Maria Jackson* mortgaged her share of the property to a building society to secure an advance of £300, and in July, 1876, she gave a further charge to the building society to secure an advance of £120, which she handed over to

(1) 26 Ch. D. 482. (2) Law Rep. 6 C. P. 411.

her brother, *R. J. Jackson*, to help him in his business, and thereupon *R. J. Jackson* executed a mortgage to her of his share, subject to the mortgage then vested in *King*, to secure repayment to her of the £120.

In January, 1883, *R. J. Jackson*, who had overdrawn his account, applied to the bank for a further advance of £2000, which he proposed to secure by a deposit of the title deeds of the *Plaistow* property.

It appeared from the evidence that during the negotiations for the advance, *R. J. Jackson* referred to his sisters as being joint owners with himself of the *Plaistow* property, and told Mr. *Fawcett*, the manager of the bank, that they were going to convey their shares to him in order to enable him to raise the money which he required from the bank—"that they were assisting with the deeds in order that they might throw the additional capital into the colliery" (in which *Robert J. Jackson* and another were interested). It was understood by *Fawcett* from this conversation that the sisters were not to get anything paid to them on execution of the conveyances. He did not make any inquiries of the sisters, and all he communicated to the solicitor was that he was to exercise great care and diligence in investigating the title, not mentioning what *Jackson* had said in reference to his sisters and that they were not to get any consideration for the conveyances executed by them.

The deeds which were deposited by *Jackson* with the bank on the 19th of January, included the conveyance of the property to *Robert Jackson* (the father); the mortgage executed by him and its transfer to *King*, on which was indorsed a reconveyance by *King* to *Jackson* of the 18th of January, 1883, in consideration of £700 (which sum was drawn out of the bank by *Jackson* on the 15th of January), and reciting two deeds of conveyance by *Ann* and *Maria Jackson* of the same date; the office copy of the father's will, and two deeds of conveyance both dated the 18th January, 1883, and executed by *Ann Jackson* and *Maria Jackson* respectively, by which deeds, in consideration, in each case, of the release of a debt of £400 alleged to be due to their brother, *R. J. Jackson*, and payment by him of £300 to each of them, they conveyed their houses to *R. J. Jackson* in fee simple.

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The advance was made, but the solicitor who then acted for the bank was now dead, and it did not appear what inquiries were made by him before advising the advance.

In September, 1883, *R. J. Jackson* absconded, being at the time indebted to the bank in more than £6000. In October, 1883, the Plaintiffs commenced this action claiming an account of what was due to them on their security (which included other property not now in question), and payment, with, in default, foreclosure or sale.

The defendants, *Maria* and *Ann Jackson*, claimed to be owners of the houses other than those which belonged to *R. J. Jackson*, and on a motion by Plaintiffs for the appointment of a receiver, the Defendants, *Ann* and *Maria Jackson*, produced two deeds dated the 18th of January, 1883—which were found amongst *Jackson's* papers after he had absconded and of which they had known nothing—whereby in consideration of natural love and affection for his sisters, the grantees, and of 10*s.* paid by each of them, *R. J. Jackson* purported to convey to them respectively the houses which had been by the above-mentioned indentures of the same date conveyed to him. These deeds were expressed to be signed, sealed, and delivered by *R. J. Jackson*, in the presence of *W. R. Thompson*, his clerk, and bore the signature of *Jackson*, but did not bear any seal or impression, but only the piece of ribbon to which the seal is usually affixed.

With respect to the deeds of conveyance, the Defendants stated that in consequence of a request made to them by post-card, they went to their brother's office on the 18th of January, 1883. He told them there were two deeds respecting the mortgage of £700, which it was necessary that they should sign, as he was going to clear off *King's* mortgage and send the deeds to *King*. Having full confidence in their brother they signed the documents, which were not read over or explained to them. No money was paid to them by *Jackson* either then or on any other occasion, nor did they owe their brother £400 or any other sum. They never authorized him to deposit the title deeds of the property with the bank by way of security when *King's* mortgage was paid off; and they denied having had any intention of assisting their brother in the colliery. This evidence was confirmed by *Thompson*, a clerk of *R. J. Jackson*, who was the attesting

witness, and deposed that the deeds were not read over nor any explanation given, and that no money passed. With respect to the deeds of reconveyance, which also purported to have been attested by him, *Thompson*, though he recognised his signature, had no recollection as to the circumstances attending their execution.

The question was whether *Maria* and *Ann Jackson*, by signing the deeds of the 18th of January, which enabled *R. J. Jackson*, their brother, to represent himself as owner in fee (by the conveyances from his sisters) had lost as against the Plaintiffs, with whom the deeds were deposited as a security by *R. J. Jackson*, their right to the property. Vice-Chancellor *Bacon* held that the Defendants had established their title, as the representation made by *Jackson* was one which put the manager upon reasonable inquiry. If he had informed the solicitor of the bank of what he had been told by *Jackson*, the solicitor would have been led to make inquiries which would have elicited the real facts; but he merely handed over to the solicitor the duty of seeing that all was right. As no such inquiry appeared to have been made, the bank could be in no better position than *Jackson* would have been, and the bank therefore was not entitled to priority as against the claim of *Ann* and *Maria Jackson*, who had not knowingly or intentionally done anything to enable *R. J. Jackson* to commit a fraud. His Lordship also held that the deeds of conveyance of the 18th of January, were void and not merely voidable, but that the bank were entitled to a charge upon the houses belonging to *Ann Jackson* for a proportionate part of the £700 due on *King's* mortgage, but not to a charge on the houses of *Maria* for £120, in respect of the mortgage to the building society. The Plaintiffs were ordered to pay so much of the costs of the action as had been occasioned by their claim against *Ann* and *Maria Jackson*, with liberty to add the amount of such costs to their security.

From this decision the Plaintiffs appealed.

Sir *Arthur Watson*, Q.C., and *E. Beaumont*, in support of the appeal:—

We are entitled, by virtue of the deposit of deeds and memo-

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randum of charge, to priority over any claim by the Defendants. By signing the deeds of conveyance of the 18th of January, 1883, the Defendants put it in the power of *R. Jackson* to create the charge, and the case falls exactly within the principle stated in *Story* on Agency and quoted by Lord Justice *Lindley* in *Gordon* v. *James* (1): "Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon." The case set up by the Defendants is equivalent to a plea of *non est factum*, but such a plea could not be sustained, "for if the party executes the deed without hearing or desiring that it may be read, yet it binds him": *Com.* Dig. *Fait* (B 2); "and though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, his deed, and he is not at liberty, upon the plea of *non est factum*, to say it was not": *Edwards* v. *Brown* (2). The cases relied upon in the Court below: *Thoroughgood's Case* (3) and *Foster* v. *Mackinnon* (4), do not controvert this principle. In the first case, though it was held "that a deed executed by an illiterate person does not bind him if read falsely either by the grantee or a stranger," it was also held that "if" (as took place in this case) "the party executes without desiring it to be read, it is binding." All that *Foster* v. *Mackinnon* decided was that a deed was invalid when "the mind of the signer did not accompany the signature: in other words that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

[COTTON, L.J.:—Was not the effect of the deeds which the Defendants signed, misrepresented to them? If their execution was obtained by fraud, cannot that be given in evidence on a plea of *non est factum?*]

They did understand they were executing, and did in fact execute deeds which enabled their brother to raise money for the purpose of paying off *King's* mortgage; and having deliberately and intentionally put it into his power to raise money on these

(1) 30 Ch. D. 249, 258.
(2) 1 C. & J. 307, 312.
(3) 2 Rep. 9 a.
(4) Law Rep. 4 C. P. 704, 711.

deeds, it would be inequitable that the Plaintiffs, who innocently advanced their money on the faith of the deeds being valid, should be postponed to the Defendants: *Perry-Herrick* v. *Attwood* (1). If they had taken the least trouble to look at the deeds, they must have seen what they were, and that the representations made by their brother could not be correct, and by their negligence in that respect they are estopped as between themselves and the Plaintiffs from denying the validity of the Plaintiffs' charge: *Hunter* v. *Walters* (2); *Swan* v. *North British Australasian Company* (3). As against subsequent purchasers for value the reconveyances, being on the face of them voluntary deeds, are utterly void.

[LINDLEY, L.J., called attention to the fact that these reconveyances were not sealed.]

A seal is essential to a deed: *Shep.* Touch. (4). Whatever equity the Defendants may have to set aside their conveyances of the 18th of January, 1883, on the ground of fraud, or to correct them for mistake, the Court will not interfere as against Plaintiffs who claim as purchasers for value without notice: *Phillips* v. *Phillips* (5); *Cory* v. *Eyre* (6); *Cave* v. *Cave* (7). Then in order to fix Plaintiffs with constructive notice of the fraud committed by *R. Jackson* it must be shewn that in circumstances such as to excite suspicion there was a desire or fixed purpose to avoid knowing more, a wilful abstaining from making inquiry, a wilful shutting of the eyes to documents or to facts: *Kettlewell* v. *Watson* (8). None of the statements made by *R. Jackson* were such as to put the manager on the scent of fraud. If it be said that the bare inspection of the deeds would have rendered it imperative on the Plaintiffs to make further inquiry, it may be answered: "Why did not you, the Defendants, look at the deeds yourselves, and thus prevent the occurrence of the original fraud, which, but for your culpable negligence, would never have been committed," *per* Lord *St. Leonards* in *Majoribanks* v. *Hovenden* (9)

(1) 2 De G. & J. 21.
(2) Law Rep. 7 Ch. 75, 87.
(3) 7 H. & N. 603; 2 H. & C. 175.
(4) Page 57.
(5) 4 D. F. & J. 208.
(6) 1 D. J. & S. 149.
(7) 15 Ch. D. 639.
(8) 21 Ch. D. 685; 26 Ch. D. 501.
(9) Dru. 11, 21.

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(commenting on *Kennedy* v. *Green* (1)). Possibly a person of great prudence, caution, and wariness, might have gone to the sisters to make inquiry, but that is not what an ordinary person would have done, and the want of that prudence, caution, and wariness, is not sufficient to affect the Plaintiffs with notice: *Jones* v. *Smith* (2). We claim at any rate, in addition to a charge for the £700, which was paid off with the money advanced by the bank, a charge on the houses of *Maria* for the £120.

Marten, Q.C., and *Montefiore*, for the Defendants:—

It is plain on the evidence that no explanation was given to the sisters, and that they were deceived by the misrepresentations of *Robert Jackson* as to the effect of the deeds which they executed, just as much as if the deeds had been falsely read to them, and therefore the deeds, which in no way represent their intentions, are void: *Thoroughgood's Case* (3); *Foster* v. *Mackinnon* (4); so that no interest could be claimed under them at law, and the Defendants could have sustained the plea of *non est factum*: *Kennedy* v. *Green*. As against the prior equity of the Defendants, the Plaintiffs, who took from *Robert Jackson*, without any inquiry, these deeds as a security, cannot set up the defence of purchasers for valuable consideration without notice: *France* v. *Clark* (5); *Société Générale de Paris* v. *Walker* (6); *Wall* v. *Cockerell* (7). The absence of an actual seal from the deeds of reconveyance is immaterial, as "to constitute a sealing, neither wax nor wafer, nor a piece of paper, nor even an impression is necessary": *In re Sandilands* (8).

[COTTON, L. J.:—That is rather a startling proposition. What seems to have been material in that case was the certificate of the two special commissioners that the deed was produced before them by the married women and acknowledged to be their respective act and deed.]

In this case there is the evidence of the attesting witness that the deeds were "signed, sealed, and delivered," and in the face

(1) 3 My. & K. 699.
(2) 1 Ph. 244.
(3) 2 Rep. 9 a.
(4) Law Rep. 4 C. P. 704.
(5) 26 Ch. D. 257.
(6) 11 App. Cas. 20.
(7) 10 H. L. C. 229.
(8) Law Rep. 6 C. P. 411, 413.

of that evidence the mere absence of sealing-wax does not, it is submitted, invalidate the reconveyances. Those reconveyances are not affected by the statute 27 Eliz. c. 4, which has nothing whatever to do with this case, which is simply that the property of the sisters, which wrongfully got into their brother's possession, came back again to the true owners, who are entitled to hold it. The bank manager after what had been told him was clearly apprehensive, for he told the solicitor to be very careful about investigating the title. The conveyances when looked at were entirely inconsistent with the account given by *R. Jackson*, and if the solicitor had made inquiry, or even looked at the deeds, he must have ascertained the real state of the case and the fraud would have been detected. *Perry-Herrick* v. *Attwood* (1) is clearly distinguishable. As the deeds were in that case left by the sisters in the hands of their brother for the express purpose of enabling him to raise money, they could not insist, as against those who in reliance on the deeds lent their money, that the brother had exceeded his authority.

Sir *A. Watson*, in reply:—

The property of the sisters had passed to *Robert Jackson* by the conveyances of the 18th of January, 1883, and then, in order to defraud the bank rather than his sisters, he executed the deeds of reconveyance, which, apart from the objection from want of a seal, are clearly void as against the Plaintiffs, being voluntary conveyances within 27 Eliz. c. 4. The manager was not bound to suspect fraud, and the negligence of the Defendants, which has enabled the fraud to be committed, is far greater than any which can be imputed to the bank manager: *Ratcliffe* v. *Barnard* (2); *Agra Bank* v. *Barry* (3).

[LINDLEY, L.J., referred to *Northern Counties of England Fire Insurance Company* v. *Whipp* (4).]

1886. May 14. COTTON, L.J.:—

This appeal is brought by the Plaintiffs, who seek to enforce an equitable charge on certain houses which belong to the

(1) 2 De G. & J. 21.
(2) Law Rep. 6 Ch. 652.
(3) Law Rep. 7 H. L. 135.
(4) 26 Ch. D. 482.

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Defendants. The charge was created by *Robert Jackson*, the brother of the ladies to whom the property belongs, and he deposited with the Plaintiffs the deeds relating to the houses, including conveyances to him from his sisters of the houses in question. They question the validity of the conveyances, and say that at the time when the charge was created and the deeds deposited with the Plaintiffs, they were owners of the property, as the deeds were absolutely and entirely void; but they do not actually put their case as if it were raised under a plea of *non est factum*, and the first question is whether they could sustain such a plea. Now I do not intend to advert to the form of pleading such a plea, but I shall consider the substance of the question. Without doubt *Jackson* did defraud his sisters in reference to these deeds, but the question is whether these deeds are void so as not to be effectual to pass any estate in the houses. Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. But I cannot come to that conclusion here. The Defendants trusted *Jackson* both as their brother and solicitor, and cannot be said to have been guilty of negligence in so doing. On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails.

The Defendants then contend that the legal estate had become revested in them, and in support of this contention they produce two other instruments purporting to be reconveyances to them from their brother, and dated the 18th of January, 1883, the day before the charge to the Plaintiffs. These instruments were not stamped until long after their date, and bear a stamp which denotes that, for some reason or other, the penalty was not enforced, as *primâ facie* it would have been. This further is remarkable, that

although these instruments are expressed to be signed, sealed, and delivered in the presence of the attesting witness, who was one of *R. Jackson's* clerks, there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. In my opinion the only conclusion we can come to is that these instruments were never in fact sealed at all. They were somehow or other prepared by *R. Jackson*, but never in fact executed by him in such a way as to reconvey the legal estate. It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and *In re Sandilands* (1) was referred to, where an instrument had been forwarded from the colonies together with an official certificate of its having been duly acknowledged, and this was recognised by the Court as a deed although there was no seal but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right there to hold that the deed had been sealed, here in my opinion it would be wrong to do so. It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here where the attesting witness who has given evidence recollects nothing of the sort, and when *Jackson* had already committed one fraud in the matter and perhaps then intended another. The question is merely one of fact, and upon the evidence it is impossible to conclude that these instruments were ever executed as deeds so as to reconvey the estate. That the sisters knew nothing of them is immaterial, as it was at any time open to them to accept the benefits which passed to them thereby, but the conclusion I come to is that the instruments never were sealed.

The case, therefore, is one of a conflict between two equities, and the Plaintiffs have a valid equitable charge if they took the deeds under circumstances such as to give it them. The case is not like that of *Perry-Herrick* v. *Attwood* (2), which was relied on on behalf of the Plaintiffs. That case was much stronger than this.

(1) Law Rep. 6 C. P. 411. (2) 2 De G. & J. 21.

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There the persons entitled had left the deeds, without there being any fraud or misrepresentation, in their brother's hands to enable him to obtain a considerable advance, and the very object of the transaction was to enable him to appear as owner. Here, one of the sisters says that she knew the object of the transaction was to get a reconveyance from *King*, who was mortgagee from one of them, and although, therefore, they knew that the deeds they were executing affected the property, they were altogether deceived as to their effect. The case, therefore, differs materially from *Perry-Herrick* v. *Attwood* (1). The question, then, is, which of the parties here has the better equity. I have come to the conclusion that the Vice-Chancellor was right, and I think that he relies on the same point as I do—upon what passed between the bank manager and *Jackson* when the application for an advance was made, though he does not specifically allude to it in his judgment. The bank had two agents, their manager and their solicitor, and cannot be in any better position by reason of one of their agents not having communicated important facts to the other agent. It was the manager's duty, if he delegated to another the duty of investigating the title, to communicate to him all the facts of the case. He did not do so; but the bank must stand in the same position as if he had done so. Each deed recites a debt of £400 due from the sister, and that in consideration of a release of this debt and payment of £300 to the conveying sister, the deed was executed. This is entirely inconsistent with the story told by *Jackson* to the manager that nothing was to be paid to the sisters. There was great negligence therefore on the part of the bank in not making further investigation as to the inconsistency between the recitals and *Jackson's* statement. It follows that the bank are not entitled to say that they relied on the recitals in making the advance, so as to establish an equitable claim against the sisters. I do not think that the question of what constitutes constructive notice arises here, and with regard to *Kettlewell* v. *Watson* (2), I will only say that the Court was there dealing with the question of what was necessary to enable the legal estate to be postponed to an equitable claim, and in the later case of *Northern Counties*

(1) 2 De G. & J. 21. (2) 21 Ch. D. 685; 26 Ch. D. 501.

of England Fire Insurance Company v. *Whipp* (1), *Fry*, L.J., himself, distinctly recognised the difference between the case of a contest between equities and one between an equitable title and the legal estate. He says (2): "The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate." And the judgment in *Kettlewell* v. *Watson* (3) is to the same effect. As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other.

This disposes of the main point in the case. But the Vice-Chancellor has allowed the bank to enforce their charge to the extent of *King's* mortgage on the houses belonging to *Ann Jackson*, which *Jackson* paid off out of their moneys; and it is now contended that they ought to be allowed the amount which was charged on the houses belonging to *Maria Jackson*. No doubt part was applied in paying off a mortgage effected by her, but it had been effected for the benefit of *R. Jackson*, and in paying it off he could not be entitled as against her to claim the benefit of having done so. In my opinion the Vice-Chancellor was right in not allowing this claim on behalf of the bank. The appeal, therefore fails, and must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion; though I think the case very nearly on the line. It is impossible, consistently with legal principles, to hold the conveyances executed by the sisters absolutely void. They knew that they related to their houses although they did not understand their effect. They trusted their brother and were cheated by him. On the authority of *Thoroughgood's Case* (4) and other cases, these deeds cannot be considered void, though they may be set aside as voidable, except as against a purchaser for value without notice. Then comes the question whether the reconveyances were executed by *Jackson*. That is a question not of law but of fact. There is no trace of a seal upon them.

(1) 26 Ch. D. 482.
(2) Ibid. 487.
(3) 21 Ch. D. 685.
(4) 2 Rep. 9 a.

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It is true that it is unimportant what a seal is made of, but there must be something in the nature of an impression on the deed to denote that it has been sealed. On a question of fact it is useless to cite cases. *In re Sandilands* (1) was, I think, a good-natured decision, in which I am not sure that I could have concurred. The Court allowed the deed to be enrolled, and the choice lay between sending the deed back to *Australia*, and enrolling it for what it was worth—I am not sure that in that case I could have come to the conclusion that the deed had been duly executed; but on the evidence in this case I certainly cannot come to that conclusion. These reconveyances, therefore, in my opinion, were worthless for protecting the sisters' interests.

Now, but for what the bank manager was expressly told by *Jackson*, I should have held that the bank had the better equity. The sisters had executed the conveyances, and the bank might have dealt with *Jackson* on the footing of their being valid; and were it not that the bank had been told what would have led it to find out the truth, the case would have come within the principle which was acted on in *Gordon* v. *James* (2). But on the evidence I do not think that the case does come within that principle. The bank was told that these ladies had not been paid and never were to be paid anything; it followed that the conveyances were not what they purported to be, and therefore the bank did not rely on the conveyances which were executed by the sisters, but on what was told by *Jackson* to the manager. If the manager had told the solicitor what he was informed by *Jackson*, the title, I venture to think, would never have been accepted. The appeal fails.

LOPES, L.J.:—

The question in this case is whether the bank can enforce their charge on these houses against the two ladies who were equitable owners of them. Were their conveyances void in law? That depends on the evidence, from which it appears that they knew they were executing deeds of some kind or other. They clearly did not know the effect of them, but as to this they placed reliance on their brother. It follows, in my opinion, that the

(1) Law Rep. 6 C. P. 411. (2) 30 Ch. D. 258.

conveyances were voidable only. On the question as to the reconveyances I will add nothing, except to say that in my opinion they were inoperative for the reasons given by the Lords Justices. Then it is said that, having regard to the circumstances under which the Plaintiffs took their charge, they are not entitled to avail themselves of it. If information was given them on which they were bound to make further inquiry, and they did not inquire, they must suffer. It is clear that the manager was told that the sisters were not to receive any money as the consideration for their conveyances. He communicated with the solicitor of the Bank, and told him to look carefully into the title, but told him nothing about his conversation with *Jackson*, nor that the sisters were to receive no consideration. I think that if he had told this to the solicitor, he, on comparing it with the recitals in the conveyances, coupled with the fact that the brother was the grantee and was getting the advance from the bank, and also that the conveyance bore date only the day before, would have made inquiry, and thereby discovered facts which would have almost compelled him to advise the bank not to accept the security. I agree therefore, that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Wilde, Berger, & Moore; Sorrell & Son.*

F. G. A. W.

C. A. 1886 May 13, 17.

In re NORTHUMBERLAND AVENUE HOTEL COMPANY.

Company—Contract by Trustee for intended Company—Void Contract—Ratification—New Contract.

A written agreement was entered into between *W.* of the one part and *D.*, as trustee for an intended company, to be called the *N. Company*, of the other part, that *W.*, who was entitled to an agreement for a building lease from the Metropolitan Board of Works, should grant an underlease to the company, and that the company should erect the buildings. The company was registered on the following day. The memorandum did not mention the agreement, but the articles adopted it, and provided that the company should carry it into effect. No fresh agreement with *W.* was signed or sealed on behalf of the company, but the company took possession of the land, expended money in building, and acted on the agreement, which they considered to be binding on them. The company failed to complete the buildings, and the Metropolitan Board re-entered. The company being in course of winding up, the trustee in bankruptcy of *W.* took out a summons to be allowed to prove for damages against the company for their breach of the agreement:—

Held (affirming the decision of *Chitty*, J.), that the agreement having been entered into before the company was in existence, was incapable of confirmation, and that the acts of the company, having evidently been done under the erroneous belief that the agreement between *W.* and *D.* was binding on the company, were not evidence of a fresh agreement having been entered into between *W.* and the company on the same terms as the written agreement, that there was therefore no agreement between *W.* and the company, and that the summons must be dismissed.

In 1882 *C. W. Wallis* negotiated with the Metropolitan Board of Works for the grant to him of a lease of certain plots of ground for a term of eighty years from the 29th of September, 1882, at a rent of £5600, upon his first erecting certain buildings on the ground within a specified time. An agreement in writing was entered into on the 2nd of October, 1882. In the meantime an agreement had been entered into, dated the 24th of July, 1882, between *Nunneley* of the one part and *James Doyle*, "as trustee for and on behalf of an intended company, to be called the *Northumberland Avenue Hotel Company, Limited*," of the other part, which after reciting that *Nunneley*, as agent for and on behalf of *Wallis*, had agreed to grant to the company, and *Doyle* had on behalf of the company agreed to take, an underlease of the

plots of ground on the terms and subject to the conditions hereinafter mentioned, it was agreed by and between the parties as follows, viz.: "The company agrees to become under-lessee for the term of eighty years, less one day, from the 29th of September next" of the plots of ground at the rent of a peppercorn for the first year and £7000 for subsequent years. The agreement contained stipulations of a character similar to those usually inserted in building agreements, which were to be performed by the company. By clause 4 the company were to be entitled to take possession on payment of a certain deposit. By clause 23, reciting that *Wallis* was negotiating for certain further plots of land, the company agreed to become lessee of them for such terms and at such rent and on such conditions as might be agreed between them and *Wallis*.

On the following day, the 25th of July, 1882, the company was incorporated. The agreement of the 24th of July was not mentioned in the memorandum, but the 2nd clause of the articles purported to adopt that agreement, and provided that the company should carry it into effect, subject to any modification which might be agreed upon between *Nunneley* and the company.

The company did not after incorporation enter into any further agreement in writing with *Wallis*, but acted upon the agreement of the 24th of July, took possession of the ground in October, 1882, and expended upon it a large sum of money, amounting to about £40,000. There was no note or memorandum of any contract with *Wallis* signed or sealed on behalf of the company after their incorporation.

In April, 1883, *Wallis* commenced an action against the company for specific performance of clause 23 of the agreement as to taking a lease of additional pieces of ground. This action was compromised, the company entering into an agreement under seal to accept a lease of the additional ground, and the matter never came before the Court. The company on several occasions made payments to *Wallis* on account of rent, and several resolutions were passed by the directors, with the assent of *Wallis*, purporting to modify some of the terms of the agreement of the 24th of July, 1882, but none of these modifications were carried into effect by means of any written documents. All these proceedings

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went on the footing that the agreement of the 24th of July was one by which the company were bound.

The company did not succeed in obtaining sufficient capital to enable it to continue its works, and in March, 1884, *Wallis* served the company with notice to re-enter under a clause in the agreement for non-completion of the works, and on the 13th of May a notice was given by the Metropolitan Board of Works determining the agreement of the 2nd of October, 1882. Shortly after this the Board of Works resumed possession.

On the 23rd of October, 1884, the company passed a resolution for voluntary winding-up, and on the 29th of December, 1884, an order was made for carrying on the winding-up under the supervision of the Court.

Wallis had become bankrupt, and *Sully*, his trustee, and two incumbrancers on the interest of *Wallis* under the agreement of the 24th of July, 1882, took out a summons asking that they might be admitted as creditors for damages sustained by them in respect of the breach by the company of that agreement.

CHITTY, J., said that if *Doyle* contracted as agent for the company, then as the company was not at the time in existence, according to *Kelner* v. *Baxter* (1) and other cases, the agreement could not be ratified by the company; that if he contracted as trustee, then, whatever claims he might have against the company if they took the benefit of the agreement, there was no contract between the company and *Wallis*. His Lordship further held that it was not to be inferred from the facts that an agreement was made between *Wallis* and the company to the same effect as the agreement of the 24th of July, 1882, and that if there had been an agreement of which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible. The summons was therefore dismissed.

The applicant appealed.

Hadley, for the Appellant:—

Although, according to the authorities, *Kelner* v. *Baxter*, and

(1) Law Rep. 2 C. P. 174.

In re Empress Engineering Company (1), the company could not legally ratify the contract, it having been made before the incorporation of the company, yet, as is remarked in the latter case, the company may become bound in Equity by the provisions of the contract. Moreover the Court will, as an inference from the facts in this case, hold that there was a contract between Mr. *Wallis* and the company in the terms of the document of the 24th of July, 1882. It would, in fact, be a fraud on the part of the company—they having taken possession of the land and acted as they did—to deny that there was a binding contract: *Crook* v. *Corporation of Seaford* (2); *Wilson* v. *West Hartlepool Railway Company* (3); *Melbourne Banking Corporation* v. *Brougham* (4); *Doe* v. *Taniere* (5); *Ecclesiastical Commissioners* v. *Merral* (6). The last case shews that there is a remedy at law as well as in equity, the Court inferring or presuming a contract from the acts of the parties. [He also referred to *Walsh* v. *Lonsdale* (7).]

Romer, Q.C., and *F. B. Palmer*, *contrà*, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty* in what, although in form it was a summons from chambers in a winding-up, was in substance an action for damages for breach of an agreement alleged to have been entered into between Mr. *Wallis*, whom the claimant represents, and the company. The first thing, therefore, that we have to see is whether in fact there was any contract between them. I am not referring to the question whether a contract was made which, in consequence of the provisions of some Act of Parliament, was incapable of being enforced, but to the question whether in fact there was any agreement between these two parties.

The company was incorporated on the 25th of July, 1882, and before that date, viz. on the 24th of July, a contract in writing was entered into between a gentleman acting as agent for and

(1) 16 Ch. D. 125.
(2) Law Rep. 6 Ch. 551.
(3) 2 D. J. & S. 475.
(4) 4 App. Cas. 156.
(5) 12 Q. B. 998.
(6) Law Rep. 4 Ex. 162.
(7) 21 Ch. D. 9.

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on behalf of Mr. *Wallis*, and another gentleman, who described himself as a trustee for the company, the company, in fact, having no existence at the time. That was a contract which was binding as between Mr. *Wallis* and the other gentleman whom I have mentioned, and was a contract which provided that certain things should be done by the company. That contract in no way bound the company, because the company at that time was not formed. In fact it was not in terms a contract with the company, although it was a contract by a person who purported to act for the company that certain things should be done by the company. It is not contended that this contract was in any way binding on the company, nor is it disputed that the company after it was formed could not ratify the authority of the gentleman who purported to act as their trustee before they were incorporated, and who therefore could not have any authority to do so.

But it is said that we ought to hold that there was a contract entered into between the company and *Wallis* on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion that will not hold. It is very true that there were transactions between *Wallis* and the company in which the company acted on the terms of that contract entered into with *Wallis* by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. *Wallis*, and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that explains the whole of these transactions. The case is entirely different from those cases which have been referred to where the Court, finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining

why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them. We are not therefore authorized to infer a contract as it was inferred in those cases where there was no other explanation of the conduct of the parties.

In my opinion the decision of Mr. Justice *Chitty* was right, and the appeal must therefore fail.

LINDLEY, L.J.:—

I am of the same opinion. The more closely the case is investigated the more plainly does it appear that there never was any contract between the company and *Wallis*. The more closely the facts are looked into the more plain is it that everything which the company did, from the taking of possession down to the very last moment, was referable to the agreement of the 24th of July, 1882, which the directors erroneously supposed to be binding on the company. I therefore cannot come to any other conclusion than the conclusion at which Mr. Justice *Chitty* arrived.

LOPES, L.J.:—

I am entirely of the same opinion.

The question is whether there was a contract between *Wallis* and the company. There no doubt was an agreement between a man called *Nunneley*, who was agent for *Wallis*, and a man named *Doyle*, who described himself as trustee for the company. But at that time the company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the company. It is also equally clear that the company, after it came into existence, could not ratify that contract, because the company was not in existence at the time the contract was made. No doubt the company, after it came into

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existence, might have entered into a new contract upon the same terms as the agreement of the 24th of July, 1882, and we are asked to infer such a contract from the conduct and transactions of the company after they came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of the 24th of July was in existence, and was a binding, valid contract. Everything that was done by them after their incorporation appears to me to be based upon the assumption that the contract of the 24th of July, 1882, was an existing and binding contract. I think, therefore, that the appeal ought to be dismissed.

Solicitors for the Appellant: *Randall & Bucknill.*
Solicitors for the Company: *Stretton & Hilliard.*

H. C. J.

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[1885 C. 1623.]

Rectification—Res Judicata—Money paid under Compulsion of Law.

After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred.

C. & Co. built a ship for *B.*, and a considerable sum remained due to them, for which they had a lien on the ship. *M.* had made advances to *B.* An agreement was made between the three parties for sale of the ship by *C.*, and for the distribution of the proceeds. The agreement was very obscure, and left it doubtful in what order the claims of *C.* and of *M.* were to be paid. After the sale *M.* sued *C.* for an account of the proceeds, and judgment was given in the Court of the County Palatine for carrying into execution the trusts of the agreement, and for the requisite account. On taking the account before the Registrar, *C.* claimed to be allowed his debt, but the Registrar held that *M.* had priority. The proceeds were amply sufficient to pay *M.*'s claim, but not *C.*'s also. The Vice-Chancellor affirmed the view of the Registrar, and made an order for *C.* to pay *M.*'s claim. *C.* appealed, but the appeal was dismissed and the money was paid to *M.* After this *C.* brought an action to rectify the agreement by making it provide that *C.*'s claim should have priority over that of *M.* *M.* pleaded

that the agreement having been executed and the money paid under the order of the Palatine Court, *C.* was not entitled to any relief:—

Held, by *Kay*, J., that the action must be allowed to proceed, for that there was no estoppel on the ground of *res judicata*.

Held, on appeal, that the action must be dismissed, for that although, the question of rectification not having been before the Palatine Court, there was no *res judicata*, *C.* could not come to have the agreement rectified after it had been worked out, and the fund distributed, under the order of the Court in the Palatine action.

IN 1880 the Plaintiffs, *Caird & Purdie*, who were shipbuilders, agreed with *W. Batten* to build him a steamship for £14,600, of which £1500 was to be paid when the vessel was framed, £3300 on launching, £3800 on delivery, and the balance of £6000 to be secured by *Batten's* acceptance, and by registry of the vessel in their joint names, or by mortgage at the Plaintiffs' option. The vessel was built, and the price was increased by extras to £15,600. The Defendants, *H. E. Moss & Co.*, made advances to *Batten*, in respect of which there was due to them on the 15th of March, 1881, £1427 5*s.* 6*d.* At the same time the balance due to the Plaintiffs from *Batten* was £6460.

On the 15th of March, 1881, an agreement was entered into between the Plaintiffs, *Batten*, and the Defendants, by which, after reciting the completion of the vessel and the fact of £6460 being due to the Plaintiffs, and reciting that *Batten*, being indebted to the Defendants, had charged to them his interest in the vessel, and that the vessel had been sold to *J. Reyes*, of *Manila*, it was agreed (1.) that the Plaintiffs should dispatch the vessel to *Manila* and receive the balance of purchase-money (£10,278) due from *Reyes*. (2.) That if *Reyes* paid the balance the Plaintiffs should deliver the vessel to him. (3.) That if he failed to pay, the Plaintiffs might sell the vessel. (4.) That the Plaintiffs should hold the purchase-money, whether received from *Reyes* or any other purchaser, "upon trust first to recoup themselves all costs, charges, and expenses of what nature or kind soever in any way connected with the said vessel on and from the 7th day of March instant, including in such costs any expenses incurred in pursuance of clause 1, after giving credit for any freight, and including in such costs Mr. *Caird's* expenses of his present journey to *London* and the legal expenses of

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the preparation of this agreement, and including the sum of £162 14*s.* 6*d.*, part of the disbursements of *H. E. Moss & Co.* in respect of the present intended voyage of the steamer, which sum *Caird & Purdie* are to pay them in exchange for proper vouchers for that amount. Second, to pay to the said *H. E. Moss & Co.* the sum of £1427 5*s.* 6*d.* now due to them by the said *W. Batten;* and, third, to pay over the balance, if any, to the said *William Batten.*"

It will be observed that the above clauses contain no provision for payment of the £6460 due to the Plaintiffs. There were some other clauses which tended to the conclusion that the real intention of the parties was that the £6460 payable to the Plaintiffs was to be paid to them in priority to the sum due to the Defendants.

Litigation as to the vessel took place at *Manila* between the Plaintiffs and *Reyes,* and ultimately the Plaintiffs sold the vessel to him for £9200, which was not enough to pay the costs, charges, and expenses which the Plaintiffs were to be recouped (amounting to more than £3000), the £1427 5*s.* 6*d.* and the £6460.

In October, 1881, *Moss & Co.* commenced an action against *Caird & Purdie* in the Chancery of the County Palatine, alleging wilful neglect and default by them in selling the vessel at an inadequate price, and asking that it might be declared that under the agreement *Caird & Purdie* were trustees for *Moss & Co.* and *Batten*; that it might be declared that *Caird & Purdie* were liable to make good to *Moss & Co.* the loss incurred by them owing to the above wilful neglect and default, and for accounts on the footing of wilful neglect and default. *Caird & Purdie* by their defence alleged that they were the mortgagees, and that *Moss & Co.* could not maintain their action without offering to redeem. The charges of wilful neglect and default were withdrawn, and on the 24th of March, 1882, judgment was given for carrying into execution the trusts of the agreement of March, 1881, and for the necessary accounts. On the accounts coming before the District Registrar, he disallowed *Caird & Purdie* the £6460, being of opinion that the £1427 5*s.* 6*d.* had priority over it. The Vice-Chancellor took the same view, and ordered *Caird & Purdie* to pay the £1427 5*s.* 6*d.* to *Moss & Co.*, but if *Caird &*

Purdie gave notice of appeal and paid that sum into Court within fourteen days, further proceedings were to be stayed pending the appeal. *Caird & Purdie* paid the £1427 5*s.* 6*d.* into Court and appealed, but the appeal was dismissed on the 18th of March, 1885. The fund in Court was thereupon paid out to *Moss & Co.*

After this *Caird & Purdie*, on the 24th of April, 1885, commenced this present action, claiming to have the agreement rectified by inserting a direction that the Plaintiffs should retain the £6460 in priority to any other payment out of the purchase-money, to have a declaration that the £1427 5*s.* 6*d.* paid to the Defendants belonged to the Plaintiffs, and that the Defendants might be ordered to repay it to them, and for damages, including the costs of *Moss* and *Caird*, and of the present action.

The Defendants by their statement of defence pleaded that this action could not be maintained, the agreement having been executed and the money paid to them pursuant to the judgment in the Palatine Court. The case was set down to be argued on this point of law under Order xxv., rule 2.

The point of law was argued before Mr. Justice *Kay* on the 15th of March, 1886.

Hastings, Q.C., and *S. Hall*, for the Plaintiffs, after stating the facts, referred to the case of *Houstoun* v. *Marquis of Sligo* (1), and asked to have a rectification of the instrument of the 15th of March, 1881, as claimed by the Plaintiffs.

[They were stopped by the Court.]

Robinson, Q.C., and *Ralph Neville*, for the Defendants:—

The question of *res judicata* has not been raised by the pleadings. There was a judgment delivered by the Vice-Chancellor of the Palatine Court, and by it the Plaintiffs have been estopped from bringing an action for rectification of the instrument. That judgment, which gave the Defendants the money (£1427 5*s.* 6*d.*) claimed by the Plaintiffs, was confirmed by the Court of Appeal, and where there has been a judgment of a Court giving a sum of money the question in reference to it cannot be raised again: *Marriott* v. *Hampton* (2).

(1) 29 Ch. D. 448. (2) 2 Sm. L. C. 8th Ed. 421.

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It is clear that where a defendant who has means of resisting a claim made by a plaintiff, and does not make use of them, but allows the plaintiff to recover what he claims by process of law, that is sufficient to disentitle him from taking proceedings to recover the sum back. The same rule applies in equity as at law.

[They also referred to the cases of *Mostyn* v. *West Mostyn Coal and Iron Company* (1), and *Hirschfield* v. *London, Brighton, and South Coast Railway Company* (2).]

KAY, J. (without requiring any reply, said) :—

A preliminary point of law has been raised under these circumstances. The Plaintiffs were shipbuilders, and agreed with *William Batten* to build a ship for him upon certain terms. When finished, *William Batten* not being able to make the payments which he had bound himself to make under the agreement, the ship was sent to sea under another contract which is set forth in the statement of claim. Under that contract the builders of the ship were to have the management of and practically the dominion over her. They were to be at liberty to sell her, and were to hold the purchase-moneys upon trust, first, to recoup themselves all costs, charges, and expenses of what nature or kind soever, in any way connected with the ship; secondly, to pay to *Moss & Co.*, the Defendants in this action, and who were mortgagees, a sum of £1427 due to them from *William Batten*, he having mortgaged whatever interest he had in the ship to them; and, thirdly, to pay over any balance to *William Batten*. An action was brought in the Palatine Court on the 20th of October, 1881, by *Moss & Co.*, the mortgagees, against the builders, *Caird & Purdie*, claiming that the trusts of the agreement should be carried into execution. Practically the claim was larger at first, but it was reduced to that ultimately. Of course, that involved a question of construction of the agreement, and, as a point of construction, the question was, "Whether, under the agreement, *Caird & Purdie* were to be at liberty to pay to themselves the balance of the moneys owing to them by *William Batten* before they handed over the £1400 to *Moss & Co.*, and, of course, before they handed over any balance of the purchase-moneys to *William Batten?*"

(1) 1 C. P. D. 145. (2) 2 Q. B. D. 1.

The Plaintiffs contended that according to the construction of the agreement that was the obvious meaning of it. There was a great deal to be said for that contention. It was, however, decided by the Registrar, in taking the accounts, that such was not the true construction of the agreement, and that they were bound to hand over the £1400 odd to *Moss & Co.* without paying themselves the balance of what was due to them. Upon the matter being taken before the Vice-Chancellor of the Palatine Court, he decided the same way, and the Court of Appeal decided the same way, according to the construction of the agreement. Whether there was a mistake or not in the agreement was not said, and of course they could not say, because that point was not raised in any way in the pleadings. What they did decide was that that was the true construction of the agreement, and that they were bound to hand the money over. Now, observe, that was an action simply for carrying out the trusts of that agreement. There was no claim in any way, either by way of defence or counter-claim, that the agreement was not, if that was the true meaning of it, in the form in which it should have been, and that it ought to be rectified. That point was not raised, either by way of defence, if it could be a defence, or by way of counter-claim in the action. Fourteen days after the Court of Appeal had decided, upon the true construction of the agreement, that the £1400 was payable to *Moss & Co.* before payment of the balance of the purchase-moneys of the ship to *Caird & Purdie*, this action was begun, stating on the face of the pleadings all these proceedings in the Palatine Court, and asking for the rectification of the agreement by inserting the words "to retain the said principal sum of £6460," which was the balance due as purchase-money of the ship from *Batten* to *Caird & Purdie.*

The point which has now to be decided is thus raised in the defence: "The Defendants further say that if every allegation of fact contained in the statement of claim were true, the Plaintiffs would not be entitled to any part of the relief claimed by the statement of claim, the trusts of the said agreement of the 15th of March, 1881, having been executed, and the amount claimed by the Plaintiffs paid under a judgment of the Palatine Court, and the Defendants submit that this point of law should be disposed

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of before the trial of the action." What is the point of law? It is stated, first of all, that the point of law is that this was *res judicata* in the Palatine Court; but in the Palatine Court, as I have already mentioned, the question whether the agreement was an agreement which ought to be rectified, and could be rectified, was not raised in any shape or way. How can that be *res judicata?* I will take from the well-known notes to the *Duchess of Kingston's Case* (1), a passage from *Vinnius* which has been adopted by English Courts, first of all in the judgment of Sir *J. L. Knight-Bruce*, V.C., in *Barrs* v. *Jackson* (2), and then by Lord *Westbury* in the case of *Hunter* v. *Stewart* (3). The extract is in these words: "*Vinnius*, in a note to the 13th title of the 4th Book of the Institutes, upon the words '*per exceptionem rei judicatæ*,' says, '*Quae ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.*'" Take one of these—*idem jus.* Did the question of rectification arise before the Vice-Chancellor of the County Palatine? In no kind of way. It was not even touched. Therefore it seems to me quite idle to say that this is a case of *res judicata.* If I were so to hold, I should be holding, in fact, that a point which never was raised in any way in the Palatine Court, which could not be raised according to the pleadings as they were before the Vice-Chancellor of the Palatine Court, was decided by him in his judgment in that action. It is manifest that, so stated, the proposition fails at once. There is nothing like *res judicata.*

Upon what ground can I stop this action for rectification of the agreement upon the submission of the Defendants? Of course, upon such a submission, I must assume that the action is well founded, and that there is a case for rectification. It is said that the money, having been paid over under the judgment of the Palatine Court, cannot be recovered. Of course it cannot be recovered on any of the grounds on which it was paid over, that is clear enough. But suppose there be another and a paramount ground, which was not before the Court at all, and

(1) 2 Sm. L. C. 8th Ed. 832. (2) 1 Y. & C. Ch. 585; 1 Ph. 582.
(3) 4 D. F. & J. 168.

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could not be before the Court in that action, why should it not be recovered on that ground in a separate action which that action does not in any way interfere with? The claim is an equity pure and simple. The Courts of Common Law had no power to rectify instruments, as we know, and this peculiar jurisdiction is, I believe, one of those which by the *Judicature Act*, 1873, is reserved to the Chancery Division of the High Court of Justice. Therefore it is a case that might be met by an allegation of laches or anything of that kind. But in this pleading I have nothing of that kind before me. The defence does not say that there was any kind of laches. Of course I do not mean to prejudice any defence that can be raised at the trial of this action, but what the Plaintiffs in this action, being the Defendants in the action in the Palatine Court, did was this. They had a very strong belief that, according to the true construction of the agreement as it stood, they were right. I cannot say that that belief was entirely groundless. It seems to me a matter which might very plausibly be argued. They were so confident of their view upon the agreement as it stood that they chose to carry that case to the Court of Appeal, and not until the Court of Appeal had decided against them did they raise the alternative case of rectification of the agreement. I am very confident that they could not raise that in any way except by a counter-claim, or a separate action. Two cases have been cited in which, under the old practice in the Courts of Common Law, a plea which raised the question that the deed or instrument was in an improper form, and that it ought to be rectified, seems to have been allowed to defeat the action where it was plain that there was a case for rectification, although the Court could not in the action then before them decree any rectification. I do not know, I am sure, how often the Courts of Common Law may have taken that course, or whether I rightly apprehend what those two decisions were. But whether that be so or not, it is perfectly familiar to everybody who has practised in the Court of Chancery that the Court of Chancery never has given, and never will give, relief on the ground that a man has a right to rectification, unless that is raised by some proceeding in the nature of an action by the person who claims it. I am not aware of any instance in which relief

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has been given on the ground that a man has a right to have the instrument rectified, unless there is a proceeding in the nature of an action claiming that rectification. Therefore, it seems to me plain that this relief could not have been given in the Palatine Court unless there had been a cross-action, either by way of counter-claim or by a substantial action brought by the Defendants, the present Plaintiffs, for rectification of the instrument. That was not done. I will not say one way or the other—because I do not think that point is properly before me now—whether the parties were guilty of such laches in not doing that as will defeat them at the trial of this action. That is a point that arises in the action, and does not arise upon this preliminary point of law. The preliminary point of law really is, whether an action of this kind can be brought or not after that judgment; and the question in point of fact is, whether that judgment did amount to an adjudication of the question raised in this action. In my opinion it clearly did not. I, therefore, decide the point of law in favour of the Plaintiffs. There will be a declaration that the judgment of the Palatine Court is no bar to this action.

T. F. M.

C. A.

The Defendants appealed. The appeal came on for hearing on the 22nd of May, 1886.

R. Neville (Sir *H. Davey*, S.G., with him), in support of the appeal:—

This action, being in substance an action to recover money which the Plaintiffs have been compelled by legal process of the Court to pay, cannot, in the absence of any allegation of fraud on the part of the Defendants, be maintained: *Marriott* v. *Hampton* (1). We do not say that this is *res judicata*, as the question was not raised in the Palatine action. It might, however, have been raised at that time either by counter-claim in that action or by cross action: *Mostyn* v. *West Mostyn Coal and Iron Company* (2); *Hirschfield* v. *London, Brighton, and South Coast Railway Company* (3); and as the Plaintiffs did not raise any question of rectification pending the former action, either in

(1) 2 Sm. L. C. 8th Ed. 421; 7 T. R. 269.
(2) 1 C. P. D. 145.
(3) 2 Q. B. D. 1.

the Palatine Court or in the Court of Appeal, they are estopped from bringing the action: *Houstoun* v. *Marquis of Sligo* (1). But assuming that they are not estopped from bringing an action for rectification of this instrument after it has been sued on, no case can be found in which rectification has been granted after the conditions and covenants of the instrument sought to be rectified have been satisfied. And rectification alone of the agreement will not assist the present Plaintiffs, as what they are really seeking is to recover payment of the £1427, which was paid under compulsion of law and with full knowledge of the facts, and therefore cannot be recovered back.

[LOPES, L.J., referred to *Brown* v. *M'Kinally* (2).]

They also cited *Seton* on Decrees (3).

Hastings, Q.C., and *S. Hall*, for the Respondents:—

Until after the trial in the Palatine Court neither party controverted this point that *Caird* and *Purdie* were entitled to pay themselves the balance of the purchase-money (£6460) before handing over the £1427 to *Moss & Co.* All that is sought by the present action is to put the agreement of March, 1881, into that state in which by the agreement of the parties it ought to have been when executed: *Ionides* v. *Pacific Insurance Company* (4).

[LOPES, L.J.:—How can you get rid of the judgment of the County Palatine affirmed by this Court that you should pay the £1427 to the Defendants?]

The case is within the principle of *Davis* v. *Hedges* (5), where it was held that the plaintiffs were not bound to set up the defendant's breaches of contract as defences in the former action, but might maintain an independent action in respect of them.

[COTTON, L.J.:—Surely getting a judgment of a competent Court against a man is no breach of contract.]

Our case is that there has never been any judgment upon the real agreement between the parties. In *Houstoun* v. *Marquis of*

(1) 29 Ch. D. 448.
(2) 1 Esp. 279.
(3) 4th Ed., p. 1341.
(4) Law Rep. 6 Q. B. 674.
(5) Law Rep. 6 Q. B. 687.

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Sligo (1) it was held that in determining whether a matter was *res judicata* the point to be considered was what was the question submitted to the Court whose judgment was relied on. In *Marriott* v. *Hampton* (2) the money was sought to be recovered on the discovery of fresh evidence—the issue in the former action was the same, and the matter therefore was *res judicata*. Here the question of rectification has never been before the Court, and we therefore are not debarred from raising it. What consequences will follow from rectification is a question that does not necessarily arise now, it may be that we cannot in this action get all the relief that we ask for, and that further proceedings will be necessary after rectification, the only point that has to be decided now is whether we are debarred from proceeding with an action to have the agreement rectified.

[COTTON, L.J.:—Is not this a proceeding in the nature of a bill of review, which required the leave of the Court to file it?]

Such bills were considered in *Partridge* v. *Usborne* (3), and *Bainbrigge* v. *Baddeley* (4). We do not indeed allege fraud, but it is contrary to equity that the present Defendants should retain the benefit of an order obtained on the footing of an agreement which they knew not to express the real meaning of the parties. It is, however, unnecessary to consider now whether proceedings to set aside the judgment of the County Palatine can be successfully maintained—that question only arises when rectification has been granted; we should probably bring an action for damages. The mistake was in allowing the judgment for execution of the trusts of the deed to go without this point being raised, but at that time both parties considered that the claim of the present Plaintiffs had priority, as the frame of the Palatine action clearly shews, for, if the present Defendants were entitled to priority, the wilful neglect and default, had it existed, would not have affected them. Whatever followed on that judgment was mere machinery. We could not bring an action to vary that decree. Under the old practice a bill of review could be brought: (1) for error in judgment—here there was none; (2) on

(1) 29 Ch. D. 448.
(2) 7 T. R. 269; 2 Sm. L. C. 8th Ed. 421.
(3) 5 Russ. 195.
(4) 2 Ph. 705.

the ground of the discovery of fresh evidence—a bill of review on that ground required leave, and here no fresh evidence was discovered; (3) where the decree had been obtained by fraud or under other special circumstances which will justify setting it aside: *Mitford* on Pleading (1). Here the present Defendants got their judgment in the Palatine Court on the representation that they took the same view of the agreement as we did. But we are not at present attacking that judgment, we are seeking to rectify the agreement—our obtaining a decree for rectification will not interfere with the judgment of the Palatine Court though it may enable us to do so by subsequent proceedings.

Sir *H. Davey*, S.G., in reply:—

The Plaintiffs rely on the frame of our former action as shewing that we took the same view of the agreement as they did, but it shews nothing of the kind. The agreement was confessedly obscure, it might have been construed in the Plaintiffs' favour, and in that case the question of wilful neglect and default would have been material to us. There is not a word in the passage from Lord *Redesdale* which has been referred to which shews that anything short of fraud is sufficient under the third head of reviewing a decree. The Plaintiffs say that when they discovered that the construction of the agreement was against them it was too late to take cross proceedings. That is not so. As soon as the point was raised they ought to have taken steps to obtain rectification, and the Palatine Court would have suspended proceedings in the original action till the question of rectification had been disposed of. Not a single case can be found in the books where a rectification has been ordered after the trusts of the instrument have been completely executed. Suppose the Plaintiffs were to get a decree for rectification, what could they do with it? It would not furnish them with grounds to impeach the Vice-Chancellor's judgment.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay* in a case of a very special character. The action is to rectify an agree-

(1) Page 92.

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ment under which, construed as it stands, a sum of £1427 has, under an order of the Palatine Court affirmed by this Court, been paid to the Defendants out of the proceeds of sale of a ship. The statement of claim sets out the written agreement into which the parties entered, states the grounds for rectifying it, and seeks to recover back from the Defendants the sum which has been paid to them. The Defendants dispute the right of the Plaintiffs to come into Court and raise this question.

We must first consider what has to be done under the agreement. Nothing remains to be done. It is an agreement as to the division of the proceeds of sale of a ship, and they have been divided. The case then is not like one where the agreement is wholly or in part unperformed. It has been wholly performed under the judgment of the Court, and then a party comes to reform the agreement and recover what has been paid under it.

Now was it open to the present Plaintiffs to raise this question during the pendency of the former suit? Clearly it was. They might not have been able to raise it in that action, but they might have commenced an action for the purpose, and the Court would not have disposed of the former action while the new one was pending. It would be against the principles on which Courts of Equity act to allow an action for rectification to be commenced at so late a stage as that at which the present action is brought. The case is entirely different from *Davis* v. *Hedges* (1). There it was indeed open to the defendant in the original action to bring forward his claim in that action by way of counter-claim; but those claims were distinct causes of action, and though he might have brought them forward in the original action it was right to hold that his not having done so did not bar him from seeking to enforce them by an independent proceeding. Here nothing remains to be done under the contract if it should be varied. Mr. *Hastings* suggested that if it were rectified the Plaintiffs might bring an action for damages. I think there is nothing to give the Plaintiffs such right of action. The Defendants obtained in the former action a judgment which was right on the materials then before the Court, and the present is an attempt to get back money paid under a judgment which is not impeached for fraud,

(1) Law Rep. 6 Q. B. 687.

and in my opinion such an action cannot be allowed to proceed. I agree with Mr. Justice *Kay* that there was no *res judicata*, but an attempt to reform a spent agreement and recover the money which has been paid under it cannot be allowed.

LINDLEY, L.J. :—

I am of the same opinion. The action in the Palatine Court was to compel the present Plaintiffs to account for the proceeds of the sale of a ship. A contest arose whether the Plaintiffs in that action were entitled to be paid a sum of £1427 in priority to a larger sum payable to the present Plaintiffs. The Vice-Chancellor decided that they were. An unsuccessful appeal from that decision was brought and the money was paid. After this the present action is brought to rectify the agreement and get back the £1427. Its object is to get rid of the effect of what was done in the Palatine Court. The question is whether the Plaintiffs can obtain any relief in this action. Mr. Justice *Kay* thought that they might, and that the action ought to be allowed to proceed, founding his decision on the ground that this was not *res judicata*, inasmuch as the question of rectification had not been raised in the former suit. I agree with him in thinking that there is no *res judicata*, but I do not agree with his inference that therefore the Plaintiffs may be entitled to relief. Can they in the circumstances of this case be entitled to rectification ? In considering that point it is important to see what the object of rectification is. If nothing remains to be done under an agreement I think there is no ground for rectifying it. Here there is absolutely nothing to be done under it. In *Houstoun* v. *Marquis of Sligo* (1) the object of rectification was plain, the lease was subsisting and an important right depended on the rectification. The Plaintiffs contend that *Davis* v. *Hedges* (2) helps them ; but I think it does not. All that case comes to is this—the plaintiff had a right of action, the defendant had a right of set-off. The plaintiff obtained a judgment without the defendant having pleaded the set-off ; that did not prevent the defendant from enforcing his right by a separate action. There the two matters were distinct. Here, if we gave a judgment for £1427, the judg-

(1) 29 Ch. D. 448. (2) Law Rep. 6 Q. B. 687.

C. A. 1886 CAIRD v. MOSS. Lindley, L.J.

ment of the Palatine Court would be inconsistent with ours, and we have no jurisdiction to set aside that judgment. The Court of the County Palatine is a Court of Equity which could have entertained the Plaintiffs' claim if brought forward at the proper time, and we are now asked to entertain a case which the Plaintiffs had an opportunity of raising there and did not raise. The Court does not rectify agreements except for some legitimate purpose, and here there is no object in rectifying the agreement except in order to defeat a judgment with which the Court has no jurisdiction to interfere.

LOPES, L.J.:—

I am of the same opinion, and have but few words to add. The object of this action is in form to rectify an agreement, but in substance to get back money which was paid under that agreement by the judgment of another Court. Now *Marriott* v. *Hampton* (1) shews that money paid under legal process cannot be recovered back while that process stands. The Plaintiffs had full opportunity of commencing these proceedings while the former action was pending, and they ought to have done so as soon as the point was taken before the Registrar. They cannot now succeed.

Solicitors for Plaintiffs: *Chester, Mayhew, & Co.*, agents for *Poole, Ulverston.*

Solicitors for Defendants: *Wynne, Holme, & Wynne*, agents for *H. Forshaw & Hawkins, Liverpool.*

(1) 7 T. R. 269.

H. C. J.

In re FOX (A LUNATIC).

C. A.
1886
May 24.

Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), s. 116 [*Revised Ed. Statutes, vol. xi., p.* 684]—*Mortgage of Lunatic's Estate to pay Debts of Ancestor—Covenant on behalf of Lunatic.*

A lunatic was entitled in fee to one moiety of real estate as one of the two co-heiresses of an ancestor who had died intestate. The real estate was liable as assets for payment of a considerable amount of simple contract debts of the ancestor which his personal estate was insufficient to pay. The Court authorized the committee to concur with the other co-heiress in a mortgage of the entirety to raise the amount of the debts, the mortgage being so framed that the lunatic's moiety was only liable for one moiety of the mortgage debt and interest, and could not be made liable for any default of the other co-heiress in payment of the other moiety of the principal and interest, but the Court declined to authorize the committee to enter into any covenant on behalf of the lunatic.

THE lunatic was entitled, as one of the two co-heiresses of her father, *Richard Fox*, to an absolute interest in a moiety of a freehold house, bringing in about £26 a year, and of certain copyholds bringing in about £122 a year, her income from the moiety of both properties being about £70, also, as one of the co-heiresses of her uncle, *Thomas Fox*, to an absolute interest in a moiety of other freeholds and copyholds. These latter freeholds brought in £881 a year, and the copyholds £721 6*s*. The total gross income of the lunatic was therefore about £870, and the net income was estimated at £750. She was found lunatic in 1884. £330 a year was allowed for her maintenance, and £100 for the maintenance of her mother. The other moiety of all the properties belonged to the lunatic's sister, Mrs. *Ward*, who was committee of the person, and Mr. *Ward*, her husband, committee of the estate.

Thomas Fox at his death in 1884 was considerably indebted on promissory notes, and, after applying his personal estate, there remained unpaid four debts amounting to £4900, with some arrear of interest. The solicitor of Mr. and Mrs. *Ward* took over these debts, and entered into negotiations for a mortgage for £5000 on the entirety of part of the freehold estate of *Thomas Fox*, for the purpose of paying them.

It was proposed that the mortgage should contain a covenant

C. A. 1886 *In re* Fox (A Lunatic).

on behalf of the lunatic to pay only one half of the principal money and half of the interest, and a proviso to protect the lunatic's estate against the exercise of the power of sale for default of payment by Mrs. *Ward* of principal or interest of the other half of the debt.

Lord Justice *Lindley*, before whom the matter came in Chambers, thought that the arrangement might be sanctioned if the mortgagee would assent to the insertion of the above proviso, and an extension of it to foreclosure as well as sale, but without any covenant on the part of the lunatic. The mortgagee was not willing to dispense with a covenant, and the case was adjourned into Court.

Phipson Beale, for the committee :—

It is clearly for the benefit of the lunatic's estate that this mortgage should be effected, for if it is not effected a suit to administer the estate of *Thomas Fox* will be necessary.

[Lindley, L.J. :—Is it clear that there is jurisdiction to mortgage the estate for payment of these debts under sect. 116 ? They are not debts or engagements of the lunatic.]

I submit that sub-sect. 3 of that section covers it, as being a mortgage to pay for an expenditure incurred for the benefit of the lunatic. Then as to the covenant in the mortgage deed.

[Cotton, L.J. :—I very much doubt whether the Court can direct a committee to covenant in the name of a lunatic.]

The mortgagee will be contented without a covenant if he has the rights of a creditor against the lunatic's estate.

[Cotton, L.J. :—I doubt whether we have jurisdiction to do more than give the mortgagee the rights of a mortgagee against the particular estate.]

It appears reasonable that there should be a covenant, and in *Davidson's* Precedents (1) a covenant by a committee on behalf of a lunatic is inserted. In the present lunacy leases have been granted with covenants for quiet enjoyment on behalf of the lunatic.

(1) 2nd Ed. vol. ii. p. 331.

Cotton, L.J. :—

It being clearly for the benefit of the lunatic's estate that this £5000 should be raised, we think we can authorize the committee to concur in the name and on behalf of the lunatic in a mortgage of the entirety of a portion of *Thomas Fox's* estate, and, if necessary, of *Richard Fox's* estate, for raising it, provided that the mortgage be so framed that the lunatic's moiety of the property cannot be made liable for any default of the other part owner in payment of her moiety of the principal and interest. We do not, however, see our way to authorizing the committee to enter into any covenant on behalf of the lunatic.

Lindley, L.J., concurred.

The order was drawn up as follows:—

We being of opinion that it is for the benefit of the said *L. M. Fox* that the committee of her estate should be at liberty to concur with the owner of the other moiety of the lands derived from *Thomas Fox*, deceased, in borrowing the sum of £5000 to pay the debts of the said *Thomas Fox*, amounting to £4900 and the interest thereon, do order as follows:—That the said *John Ward* be at liberty, as the committee of the estate of *L. M. Fox*, to raise £2500, to be secured with interest at a rate not exceeding £5 per cent. per annum by mortgage of the moiety of the said *L. M. Fox* of the freehold hereditaments derived by her from the said *Thomas Fox*, and by mortgage of her moiety of the freehold hereditaments derived from her late father, *Richard Fox*, and be also at liberty, but with the approval of the Masters in Lunacy, to include in such security the moiety of the said *L. M. Fox* of the copyhold hereditaments derived from the said late *Thomas Fox*. But the deed or deeds to be settled by the Masters in Lunacy pursuant to Order xcv. of the Lunacy Orders, 1883, is or are not to contain any covenant by or on behalf of the said *L. M. Fox* for payment of the principal sum borrowed and of the interest thereon, nor is her estate to be made liable to the payment of the other moiety of the said £5000 and interest, nor for any default in payment of principal or interest by the co-owner.

Solicitors: *Cheston & Sons.*

H. C. J.

C. A.
1886
PEARSON, J.
April 16, 17.
C. A.
May 26.

In re EMANUEL & SIMMONDS.

Solicitor and Client—Costs—Taxation—Costs of Preparation of Lease and Agreement for Lease—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c. 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2; *Schedule I., Part II.*

The scale fee prescribed by Part II. of Schedule I. to the General Order of August, 1882, under the *Solicitors' Remuneration Act*, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee.

Decision of *Pearson*, J., affirmed.

An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, and that, on the lessor complying with these conditions, the lessor should grant and the lessee accept a lease in the form thereto annexed:—

Held, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of rule 2 of the General Order, and could not be separately charged for.

"Agreements for leases" in Schedule I., Part II. mean agreements for leases intended to be relied on as regulating the tenancy without any formal lease and the scale fee is payable in respect of them.

SUMMONS to review a taxation of costs.

On the 10th of January, 1885, Messrs. *Emanuel & Simmonds*, solicitors, acting on behalf of Mr. *A. H. Beddington*, prepared an agreement for a lease to be granted by him of some premises in *Lime Street*, in the city of *London*, to Messrs. *Benecke & Horsfall*. By clause 1 the lessor agreed to grant to the lessees a lease of the premises for twenty-one years from the 25th of March, 1885, determinable on certain conditions at the option of the lessees at the end of the first seven or fourteen years, at the yearly rent of £1150, "such lease to contain the covenants, clauses, provisoes, and agreements contained in, and to be in the same form as, the form of lease hereunto annexed and signed by the parties hereto." Clause 2 provided that the lessees should, on the lessor

duly fulfilling and performing the several stipulations mentioned in clause 3 of the agreement, accept such lease, and duly execute and deliver to the lessor a counterpart thereof, and that such lease and counterpart should be prepared by the solicitors of the lessor, and the lessees should pay the expenses of and incidental to the preparing and executing the agreement and the lease and counterpart, but that the obligations, covenants, and rent under such lease should commence on the lessee's part only from the date of the completion of the works in clause 3 of the agreement mentioned, and possession being given to the lessees complete in accordance with the said stipulations. By clause 3 the lessor agreed at his own expense to execute certain specified alterations in and repairs to the premises. And clause 4 provided that the lessor should deliver to the lessees possession of the premises so soon as the alterations and works should have been completed, and not later than the 1st of March, 1885, and that in this respect time should be of the essence of the agreement.

The alterations and works stipulated for were duly executed, and the lessees took possession of the premises.

Messrs. *Emanuel & Simmonds* delivered their bill of costs for the preparation of the lease and counterpart to the lessees, their charges amounting to £53 8*s.* 2*d.* In this bill they charged for the lease and counterpart £24 10*s.*, that being the amount of the scale fee as prescribed by Part II. of Schedule I. to the General Order of August, 1882, under the *Solicitors' Remuneration Act*, 1881. They charged also £5 5*s.* for surveyor's expenses, and £6 10*s.* 6*d.* for stamp duty and petty disbursements, making a total of £36 5*s.* 6*d.* They charged also separately for the preparation of the agreement in detailed items, in accordance with the old system as altered by Schedule II. to the General Order. The lessees' solicitors objected that the scale fee for the lease and counterpart included the costs of and incidental to the preparation of the agreement, and they obtained an order for the taxation of the bill. The Taxing Master disallowed all the items relating to the preparation and execution of the agreement, and taxed the bill down to £36 10*s.* 6*d.*, and in answer to objections carried in by Messrs. *Emanuel & Simmonds*, said that he

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was of opinion that the preparation of the agreement could not properly, having regard to the General Order and the decisions of the Court thereon, especially *In re Field* (1), be charged separately, and in addition to the fee allowed to the solicitors by Part II. of Schedule I., but must be included in that fee. He stated his opinion to be that sub-sects. 1 and 2 of sect. 8 of the *Solicitors' Remuneration Act* did not apply to the case, since that section applied only to agreements between the solicitor and his client, which the agreement of the 10th of January, 1885, was not.

Messrs. *Emanuel & Simmonds* took out this summons to review the taxation in accordance with their objections.

The summons came on to be heard before Mr. Justice *Pearson* on the 16th of April, 1886.

D. L. Alexander, for the summons :—

A solicitor is entitled to be remunerated according to the old system as altered by Schedule II. to the General Order under the *Solicitors' Remuneration Act*, 1881, for all business the remuneration for which is not prescribed in Schedule I. (2).

(1) 29 Ch. D. 608.

(2) Rule 2 of the Order provides: "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action or transacted in any Court, or in the chambers of any Judge or Master, is to be regulated as follows, namely :—

"(*a.*) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained.

"(*b.*) "In respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Schedule I. to this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I.

"(*c.*) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences or agreements therefor, reconveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or

The preparation of an agreement for a lease is not included in Part II. when there is an agreement as well as a lease. The words of the heading are, "Leases *or* agreements for leases." *In re Field* (1), on which the Taxing Master relied, does not apply. There was no agreement for a lease there. The Court of Appeal held that the negotiations for the lease were included in the scale fee, because the negotiations were, within the meaning of rule 2, "business connected with the lease." That does not apply to an agreement for a lease, especially when, as in the present case, the agreement was more than a simple agreement for a lease. In *In re Field* it was argued that preliminary negotiations must be included in the scale fee in the case of a lease, because, in the case of a sale, Part I. of Schedule I. provides expressly that a fee shall be paid for the negotiation of the sale. But in Part I. the scale fee for the vendor's solicitor for deducing title and perusing and completing conveyance, expressly includes also "preparation of contract and other conditions of sale, if any," and the scale fee for the purchaser's solicitor for investigating title and completing conveyance expressly includes also "perusal and completion of contract, if any." This shews that, in the case of a lease, where there is also a preliminary agreement, the remuneration for the preparation of the agreement is not included in the scale fee. Part II. of Schedule I. applies to an agreement for a lease only where there is an agreement not followed by a lease. Where there is an agreement followed by a lease, the solicitor is entitled to charge for the agreement according to the old system as altered by Schedule II.

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mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto."

Part I. of Schedule I. is headed—

"Scale of Charges on Sales, Purchases, and Mortgages, and Rules applicable thereto."

Part II. is headed—

"Scale of Charges as to Leases, or Agreements for Leases, at Rack Rent (other than a mining lease, or a lease for building purposes, or agreement for the same)," and it provides that the "lessor's solicitor for preparing, settling, and completing lease and counterpart" shall be entitled to certain rates per cent. on the rental.

(1) 29 Ch. D. 608.

C. A. *Stirling*, for the lessees, was not heard.

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PEARSON, J.:—

The solicitors who prepared the lease in this case previously prepared an agreement for the lease, and, when the lease had been substituted for the agreement and the whole transaction was completed, they made out their bill of costs and charged the *ad valorem* fee for the preparation of the lease, and they also charged separately for the preparation of the agreement. The Taxing Master has disallowed the charges for the agreement, being of opinion that it was paid for by the *ad valorem* fee for the lease, and that he was precluded by the decision of the Court of Appeal in *In re Field* (1) from coming to a contrary conclusion. In my opinion he was right, and I am equally bound by that decision. In that case there were some preliminary negotiations for a lease, and the solicitor made a charge for them in addition to the *ad valorem* fee for the lease. Mr. Justice *Chitty* disallowed that additional charge, and the Court of Appeal affirmed his decision. Lord Justice *Cotton* said (2): "The question is whether negotiations preparatory to the granting of a lease are not business connected with a lease. In my opinion they are, and, if so, the charges in respect of them are covered by Part II. of Schedule I., whatever its precise terms may be." Lord Justice *Lindley* and Lord Justice *Fry* agreed in this view. I cannot see my way to hold that the agreement in the present case was anything but part of the business connected with the lease, and I am confirmed in this view by the heading of Part II. of Schedule I. to the Remuneration Order, "Scale of Charges as to Leases or Agreements for Leases." There is to be one *ad valorem* scale fee for a lease and everything connected with it, and for an agreement for a lease if no lease is granted. The summons will be dismissed with costs.

W. L. C.

C. A. The solicitors appealed. The appeal was heard on the 26th of May, 1886.

(1) 29 Ch. D. 608. (2) 29 Ch. D. 615.

A. Charles, Q.C., and *D. L. Alexander*, for the appeal :—

Schedule I., Part II., of the rules made under the *Solicitors' Remuneration Act* (44 & 45 Vict. c. 44), fixes a remuneration by scale "for preparing, settling, and completing lease and counterpart." We say that the preparation of the agreement is business coming under the description in rule 2 (*c*) of "business the remuneration for which is not hereinbefore or in Schedule I. hereto prescribed." The agreement was an effective and material instrument; it provided for certain repairs and alterations being done within a certain time, and time was made of the essence of the contract. It was therefore not a mere agreement for granting a lease containing certain stipulated provisions. Now is the remuneration provided for by Schedule I? Rule 2 (*b*) speaks of agreement for leases, and Schedule I., Part II., in its title mentions them, but as the remuneration is only given for preparation of the lease and counterpart, "agreements for leases" must mean agreements under which tenants hold lands without formal leases being granted, the object of naming agreements for leases being that where it was not intended to have a lease the remuneration might not be left unprovided for. Some light is thrown on the question by Schedule I., Part I., which deals with remuneration in cases of sales, purchases, and mortgages. A scale fee is given to the vendor's solicitor for deducing the title to property and perusing and completing conveyance "(including preparation of contract or conditions of sale, if any);" and again, to the purchaser's solicitor for investigating title and preparing and completing conveyance "(including perusal and completion of contract, if any)." So where the rules intended a contract to be included they said so. We say, then, that the preparation of this agreement is extra business for which the solicitors are entitled to be paid. *In re Field* (1) has been relied on against us, but in that case there was nothing but negotiations—no written agreement was entered into—there were merely heads of agreement which contained the result of the negotiations but did not make a contract. There was therefore no conveyancing business to be charged for beside the lease and counterpart. The decision from which we appeal goes much further than *In re Field*, which

(1) 29 Ch. D. 608.

C. A. 1886 *In re* EMANUEL & SIMMONDS.

only decided that negotiations were included in the scale fee, whereas here a separate piece of conveyancing has been held to be included. Mr. Justice *Pearson* seems to have read *In re Field* (1) as deciding that all business connected with a lease comes within the scale fee, but the case does not decide that. Where would such a rule stop? Before a lease could be granted it might be necessary to obtain a surrender of a prior lease, the conveyancing work required for that would certainly be connected with granting the lease, but could it be contended that it was included in the scale fee? Suppose a lessee agrees for a further term to be granted at the expiration of his existing term which has ten years to run. The business will not be completed till then. Is it to be held that the preparation of the agreement is a thing which cannot be separately charged for, so that the solicitor cannot get any remuneration till the end of ten years?

Northmore Lawrence, contrà:—

Rule 2 says that the remuneration of a solicitor "in respect of business connected with sales, purchases, leases, &c., and other matters of conveyancing" is to be regulated as follows. Therefore what we are dealing with is the remuneration of a solicitor in respect of business connected with a lease. Surely this is business connected with a lease.

[COTTON, L.J.:—The Appellants say the agreement includes something to be done outside the lease.]

That something was part of the terms on which the lease was to be granted. The agreement settles the terms, and it cannot make any difference whether one of the terms was that a premium should be paid or that certain works should be done.

[He was then stopped by the Court.]

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson* upon a summons to vary the Taxing Master's certificate. The question turns on the true construction of the *Solicitors' Remuneration Act*, 1881, and the General Orders under it. Mr. *Beddington* had a house and Mr. *Benecke* proposed to take it, but before he would

(1) 29 Ch. D. 608.

take it he required certain repairs to be done. An arrangement was made what those repairs were to be, and then, Mr. *Benecke* not being content to take the house until they were done, an agreement was signed to which was annexed the form of the intended lease, and that agreement provided that certain repairs should be done within a limited time, and upon those being done that possession should be given to the intended lessee, and that the lessor should grant and the intending lessee should accept the lease. In the bill of costs an *ad valorem* charge was made for the lease and counterpart according to the scale, and a separate set of charges according to the old system as altered by Schedule II. for the matters considered to be connected with this agreement and with the repairs to be done. The Taxing Master said that the whole of this must be covered by the *ad valorem* payment. I think he was right. We have previously had the point before us to some extent in the case of *In re Field* (1), and what we decided was, that, having regard to rule 2, the remuneration for the negotiations for a lease must be held to be included in the payment to be made on the *ad valorem* scale for the lease. Of course that could only apply where the transaction was a completed transaction. But it is said that in that case there was no agreement beforehand, whereas here there is a separate independent agreement which ought to be paid for separately, as being business not otherwise provided for. That was supported on this ground, that Part II. of Schedule I., which relates to leases or agreements for leases, only refers to one payment being made for a lease—or that which is equivalent to a lease, an agreement for a lease intended to operate as a lease—and therefore this is to be dealt with as something not specially provided for. I agree as to Part II. that "lease" means an actual lease, a proper lease, and that "agreements for leases" means agreements on which the parties intend to rely as sufficient for the purpose of stating the terms on which the property was held without having formal leases executed. But that does not settle the question, because rule 2 says this: "The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other

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business not being business in any action . . . is to be regulated as follows." It is true the subsequent directions in (b) and the directions in Part II. of Schedule I. merely give in terms a remuneration for the lease and counterpart, but in my opinion, as was pointed out in the case of *In re Field* (1), although the remuneration is simply with reference to the rent, or, if there is a premium paid to the lessor for the lease, then with reference also to the premium, yet the remuneration for all business connected with the lease is to be included in the *ad valorem* remuneration. That was considered to be a fair way of settling the remuneration of a solicitor so as to prevent discussion and questions and a detailed bill of charges as regards particular items of business done. To my mind the only question we have here is this, whether in this particular case it can be said that this agreement, or anything in it, is anything but business connected with the lease; that is to say, a stage in the negotiations leading to the granting of the lease. I can quite understand that where a lease is granted there may be an agreement which, although it refers to the lease, is to be considered as a collateral matter, as a matter not amounting merely to a step in the negotiations for a lease, or providing for a step in the negotiations for a lease, but providing for something different. In the present case there was a negotiation for a lease. The lessee said: "I will give for that house a certain rent if you put it into a certain state of repair." It was thought desirable when that was agreed to fix the parties by putting it into writing, and, though clause 3 at first sight looks rather like a collateral agreement, something outside the lease, the agreement, in my opinion, amounted to nothing more than putting down on paper the terms which during the negotiation for the lease had been agreed to as the terms on which the lease should be granted and taken. It must depend on the circumstances of each case whether an agreement is collateral or not. In the present case the agreement, in my judgment, is merely part of the negotiation for the lease which was afterwards granted, and, the transaction being complete, one charge must, in my opinion, cover all charges with reference to this agreement, as well as everything else connected with the granting of the lease

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or the negotiations for the lease. In my opinion, therefore, this appeal must be dismissed.

LINDLEY, L.J. :—

I am of the same opinion. I think there is a little obscurity about these rules and schedules. But when we come to understand this particular case the difficulties do not by any means appear insuperable. The business the solicitor here had to transact appears to me to be one transaction, the preparation of an agreement and a lease, not two separate pieces of business. By the 2nd of the rules under the *Solicitors' Remuneration Act*, 1881, it is provided that the remuneration of a solicitor in respect of business connected with leases shall be regulated as thereinafter mentioned. Then (*b*) provides for what his remuneration is to be in respect of leases and agreements for leases of the kinds mentioned in Part II. of Schedule I., when the transactions shall have been completed. Then (*c*), so far as is material for this purpose, relates to other business the remuneration for which is not thereinbefore, or in Schedule I., provided for. As I read those three clauses, this case is not within (*c*) but within (*b*), which directs us to look to Schedule I., Part II., for the scale of remuneration. We find there a scale of remuneration calculated on a certain percentage of the rental. The controversy is whether the solicitor who is to be paid that *ad valorem* remuneration can charge for the preparation of the agreement for the lease as other business. I think he cannot. Mr. *Charles* tried to put it on clause (*c*). I do not think it comes within (*c*), for it is "hereinbefore provided for," that is, by clause (*b*). I agree with the other members of the Court in thinking that agreements for leases are mentioned in the heading to Schedule I., Part II., to meet the case where a man goes into possession under an agreement for a lease without intending to take a lease at all. In such a case the agreement is to be paid for as if it were a lease. I cannot gather from this language that there is to be a double payment where there are both an agreement for a lease and a lease, which together form in reality only one piece of business.

As regards clause 3 of the agreement, as to repairs to be done by the landlord, which was much relied upon, I cannot regard it as

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anything more than a term of an agreement for a lease. It does not prevent the whole document from being an agreement for a lease and nothing else. Mr. *Alexander* relies on the introduction into Schedule I., Part I., which relates to sales and purchases, of an express reference to a contract for sale: "Vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." No doubt the argument drawn from this, that where it was intended that a contract should be included, that intention was expressed, is legitimate; but I do not think it sufficient to turn the scale, the language relating to leases being to my mind sufficiently clear. Although this case is not precisely covered by *In re Field* (1), it is within the principle upon which the Court acted in deciding that case, and I think that the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. It seems to me that this charge with respect to which we are about to pronounce our judgment is for business which is done by the solicitor in respect of the lease. I think that, in considering the merits of this question and the principle of law we have to decide, we may put aside the alternative or disjunctive clause "or agreements for leases" in Part II. of Schedule I. I will assume that this expression is intended to include and cover, so that it shall not escape from the operation of the schedule, that special kind of document under which the tenant obtains possession of the land without a document amounting in the eye of the law to a formal demise. The real question here is, whether the business which has been separately charged for is business done in respect of the lease which was ultimately granted? It seems to me that this depends upon the question, whether the transaction is single or double, whether a document has been executed with the view of embodying stipulations which are more than part of the agreement for a lease, and something collateral to it and outside it, or whether the intermediate document, although it may have contained stipulations which will not ultimately find their way into the lease, nevertheless contains

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only such stipulations as are incidental to the negotiations for the lease. It is obvious that in each case this question must be decided on a view of the whole transaction, because a document, though it may be under one seal and contained in one piece of paper, may really contain various separate and independent contracts. It does not follow necessarily, as a matter of law or as a matter of business, that a document which is called an agreement for a lease may not contain stipulations with regard to subject-matters so separate and so distinct as that those stipulations form no part of the agreement for the lease, but involve transactions outside. Looking at the matter from that point of view, the difficulty suggested by the Appellants' counsel as to the cases of reversionary leases and surrenders ceases to present a difficulty. It may well be that business done with regard to an agreement for a reversionary lease is a separate business totally distinct from the reversionary lease itself, and may be separate from it for the purpose of discussing the remuneration of the solicitor. The same observation applies to the case of a surrender. But it by no means follows that no collateral stipulations are part of the business which culminates in a lease. We know that in every negotiation for a lease the parties approach each other by steps, at each stage in the discussion oral terms are arrived at which bring the parties nearer to the final bargain. These terms must be considered part of the negotiations for the lease, and if they are reduced to writing they do not thereby cease to be part of the negotiations. When we look at this particular agreement I think that the clauses on which the Appellants rely are only part of the terms on which the lease was to be granted, that the embodying those terms in this document was simply for the purpose of the lease, and that the preparation of the agreement was business done in respect of the lease.

Solicitors: *Emanuel & Simmonds; Druces & Attlee.*

H. C. J.

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PEARSON, J.
April 7, 12, 13.
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May 12, 13, 14, 27.

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Solicitor and Client—Taxation—Refresher Fees—Consultation Fees—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-s.* 48—*Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 17 [*Revised Ed. Statutes, vol. xvi., p.* 301] —*Interest on Disbursements.*

The special allowances and scale of fees mentioned in Rules of Supreme Court, 1883, Order LXV., rule 27, sub-sect. 48, are applicable to all taxations, whether in an action in the Supreme Court, or under the common order, or under a special order obtained by a client against his solicitor under the jurisdiction given by the *Solicitors Act*, 1843 (6 & 7 Vict. c. 73).

But Order LXV., rule 27, sub-sect. 48, does not prevent the client from giving the solicitor authority, which may be express or implied, to employ a particular leader, and to give him such special fees by way of refresher or otherwise, though of far larger amount than the maximum fixed by sub-sect. 48, as may be necessary to secure his services. And such authority having been shewn by the evidence to have been clearly and distinctly given by the clients (a board of directors) to their solicitor:—

Held (reversing the decision of *Pearson*, J.), that the Taxing Master was not precluded from allowing more than the maximum scale fee fixed by sub-sect. 48, and that he must exercise his discretion as to the *quantum*, having regard to the authority given by the clients to their solicitor.

There is no recognised rule that where special fees have been paid to the leader, the fees paid to his juniors must be according to the same rate; and, accordingly, in the absence of proof that the clients had authorized payment of special refresher fees to the junior counsel proportionate to those paid to the leader, the disallowance by the Taxing Master of special refresher fees to the junior counsel was upheld.

Although the case was one of very great magnitude and complication, and occupied twenty-nine days, the Court declined to interfere with the discretion of the Taxing Master in disallowing extra fees paid by the solicitor to his counsel for consultations.

Held, also (*per Pearson*, J.), that a solicitor who has made disbursements for his client, and who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under sect. 17 of the *Solicitors Act*, 1870, claim interest on the disbursements.

SUMMONS to review a taxation of costs as between solicitor and client.

The summons was taken out by Mr. *Charles Harrison* to review the taxation of the costs of the Plaintiffs in the action of *London*

Financial Association v. *Kelk*. He was the solicitor for the Plaintiffs in that action. The trial of the action before Vice-Chancellor *Bacon* occupied twenty-nine days, and the action was ultimately dismissed with costs (1).

The Plaintiffs were represented by four counsel, viz., Mr. *Davey*, Q.C., Mr. *Everitt*, Q.C., Mr. *Stirling*, and Mr. *H. Burton Buckley*. After the first day daily refreshers were paid by Mr. *Harrison* to these gentlemen respectively of the following amounts: 50 guineas, 35 guineas, 30 guineas, and 25 guineas. On the taxation the Taxing Master reduced the amounts respectively to 10 guineas, 10 guineas, 7 guineas, and 5 guineas.

Mr. *Harrison* carried in an objection to this disallowance on the following grounds:—"(1.) That the scale of fees fixed by Order LXV., rule 27, sub-sect. 48, does not apply to the present taxation or to a taxation as between a solicitor and his own client. (2.) That the fees were actually paid to counsel, and were such as are usually charged by and paid to the counsel employed. (3.) That the *London Financial Association*, having authorized the employment of the counsel in question, must be taken to have authorized the payment to them of all necessary and proper refresher fees, having regard to the position of such counsel, the magnitude of the case, and the length of time occupied by the case. (4.) That the *Association* were informed of and sanctioned the payment to Mr. *Davey* of the refresher fee of fifty guineas, and were also informed of and sanctioned the payment to the other counsel of refresher fees in proportion to the fees paid to Mr. *Davey*, and such sanction was given with the knowledge that the full amount of those fees would not be allowed on a party and party taxation."

In answer to this objection the Taxing Master replied as follows:—"(1.) The refresher fees were incurred after the 24th of October, 1883. Sub-sect. 48 of rule 27 of Order LXV., therefore, applies to the taxation. The Master has no authority to allow more than the amount fixed by the rule, whether as between party and party or solicitor and client. Anything beyond the sum so fixed is an extraordinary expenditure, which a solicitor cannot incur under the general authority of his retainer. He

(1) 26 Ch. D. 107.

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must have his client's express authority, given after a full explanation that the amount of the excess would be disallowed as between party and party. The rule should have been brought to the attention of the client. (2.) The payment has been vouched. Even if the fees are such as are usually charged by the counsel employed, which is not proved or admitted, they cannot be allowed for the reasons given in the last preceding answer. (3.) Necessary and proper fees are such as are necessary and proper having regard to the order which limits refresher fees to the amount fixed by sub-sect. 48. Nothing in excess of that limit is necessary and proper, unless previously authorized by the client. (4.) The onus of proof of the facts alleged in this paragraph lay upon the solicitor, but the evidence did not prove either that the *Association* sanctioned the payments, or that such sanction was given with the knowledge that the full amount would not be allowed on a party and party taxation."

The Taxing Master also disallowed some of the fees charged as paid to counsel for consultations. The fees had been paid in proportion to the time occupied in the consultations, which occupied sometimes an hour, one hour and a-half, two hours, and on one occasion as much as two hours and a-half. The Taxing Master refused in most cases to allow more than the ordinary fee of two guineas.

Mr. *Harrison* objected to the disallowance on the following grounds:—"(1.) That the consultations were actually had, and were necessary for the purposes of the trial of the action, and exceeded in length the consultations covered by an ordinary consultation fee, and were not protracted beyond the necessary length. (2.) That the fees were actually paid to counsel, and were such as are usually charged by and paid to the counsel employed, and it would have been impossible to have had the consultations for smaller fees. Mr. *Davey's* rule as to fees on consultations is, that each half hour, or part of a half hour, occupied is to be paid for as a separate consultation. The *Association* had directly authorized the employment of the counsel in question, and it is submitted that that authorization carried with it the right on the part of the solicitor to pay all fees of such counsel without obtaining the sanction of the *Association* to the

payment of each particular fee on each particular occasion, and it would have been impracticable to have obtained such consent."

To this objection the Taxing Master replied: "Having regard to the allowance of the large fees paid on the briefs" (850 guineas was paid on Mr. *Davey's* brief and allowed on taxation, and the other fees were in proportion), "and the refreshers paid daily, and allowed according to the scale, I did not feel justified in allowing anything for these numerous consultations beyond the usual fee."

Mr. *Harrison* made a claim under sect. 17 of the *Solicitors Act*, 1870, for interest on disbursements made by him for the *Association*. The claim was disallowed by the Taxing Master who, in an answer to Mr. *Harrison's* objection to the disallowance, said: "A summary or account shewing such disbursements was laid before me, by which it appears that the disbursements up to the 7th March, 1884 (beyond which date the account does not extend) amounted to £6007 6*s.* 10*d.*, and that the solicitors had received on account thereof £7500, leaving a sum in their hands of £1492 13*s.* 2*d.* beyond their disbursements. Except for the short period between the 10th of November, 1883, and the 7th of March, 1884, the receipts always exceeded the amount of disbursements. Considering that payments were invariably made when asked for, much beyond the amount due for disbursements, and that it must have been the fault of the solicitors themselves if they ever remained in advance, and considering that from the 7th of March, 1884, when they received £4000, they had in hand just £1500 on account of the general bill, which was not delivered until the 12th of May, 1885, this did not appear to me to be a case for giving interest under the statute to the solicitors, against whom I had no power to charge interest on the other side of the account."

In the course of the argument the following correspondence was referred to.

On the 13th of February, 1866, Mr. *Follett*, one of the Taxing Masters of the Court of Chancery, wrote to Mr. *Hodgson*, one of the Masters of the Courts of Common Law, as follows:—

"Will you kindly answer these questions for us?

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"(1.) Is it the practice of the Masters of the Common Law Courts, in the taxation of costs as between party and party, to allow daily refreshers paid to counsel in trials which last more than one day?

"(2.) If so, is the refresher a common sum fixed by custom at £10 10*s.*, or any other sum?

"(3.) Or is the amount discretionary?

"(4.) If the refreshers are allowed, is the same sum paid both to the leader and the junior counsel?

"(5.) Does the allowance of the refreshers, if allowed, depend at all on the sufficiency or insufficiency of the fee marked on the brief?"

On the 16th of February, 1866, Master *Hodgson* replied as follows:—

"It is the practice of our office to allow as between party and party daily refreshers to counsel in trials which last more than one day, subject, however, to this observation, that the trial must be one which necessarily occupied more than one day, *e.g.*, we do not allow any refresher where the trial runs into a second day merely because it began late on the first day.

"I think the rest of your questions will be completely answered by my sending you a copy of a rule to which all the Masters in Queen's Bench agreed in March, 1863.

"'Refreshers at Nisi Prius.

"'The maximum is to be £10 10*s.*, £7 7*s.*, and £5 5*s.* Regard is to be had to the amount of the original fee, to the nature of the action, and to the duration of the trial. The Master may disallow refreshers altogether.

"'The maximum sums of £10 10*s.*, £7 7*s.*, and £5 5*s.* refer to three counsel, in case so many are allowed. Where only two counsel are allowed £10 10*s.* and £5 5*s.* are allowed as maximum refreshers.'"

These letters were brought before *Malins*, V.C., in *Smith* v. *Buller* (1) and before *Jessel*, M.R., in *Harrison* v. *Wearing* (2).

The question came again before *Hall*, V.C. upon an applica-

(1) Law Rep. 19 Eq. 473. (2) 11 Ch. D. 206.

tion, made in the winding-up of the *British Imperial Insurance Corporation*, to review the taxation of the costs of the liquidator in the action of *Cargill* v. *Bower* (1).

On this occasion a letter was, on the 28th of February, 1882, written to Master *Hodgson* by Mr. *Wainwright*, the Taxing Master of the Chancery Division, to whom the taxation had been referred, asking for his opinion "on the present state of daily refreshers," inclosing a copy of the above letters, and asking "whether you should now alter your opinion, and, if so, what your view at the present time is about the proper amount of these daily refreshers."

The letter continued, "I think that the daily refresher ought to be considered quite apart from any additional fee upon papers which may be deemed proper. It also appears desirable that it should be a fixed fee, and be the same between party and party and solicitor and client. Otherwise it will be any amount that solicitors and counsels' clerks may think fit on any occasion."

On the 1st of March, 1882, Master *Hodgson* replied: "We still act upon the rule stated by me in my letter to Mr. *Follett* in 1866, and I see no reason to alter or modify anything there stated."

The letter continued: "I quite agree that the question of daily refreshers ought to be considered quite apart from any additional fee upon the brief which may be rendered necessary or proper by reason of fresh material being placed before counsel during the trial. But I think it would be proper in such a case to look at the original and additional fee together, in order to decide whether any or what amount of refreshers should be allowed. I mean by this that, if you should consider the whole fee paid with the brief sufficient to cover the whole of the time and labour given by counsel, you should disallow any refresher."

"I also think that (unless there is a special authority from the client to allow a greater payment, with the knowledge that it could not be recovered from the opposite party), the amount allowed for refreshers between party and party should be the same as that allowed between solicitor and client."

(1) 10 Ch. D. 502.

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Master *Wainwright* acted on the rule so laid down, and his taxation was affirmed by *Hall*, V.-C.

The summons came on for hearing before Mr. Justice *Pearson* on the 7th of April, 1886.

Cookson, Q.C., and *Levett*, for the summons:—

Sub-sect. 48 (1) of r. 27 of Order LXV. does not apply to taxations between solicitor and client. The refresher fees mentioned in it would in heavy cases like the present be wholly inadequate to the labour imposed upon counsel. If only these fees could be allowed, their insufficiency must be compensated by the fee marked on the brief. This would be injurious to the client, because the solicitor, not being able to tell beforehand how long the trial would last, would be obliged to mark fees of speculative amounts. The rule must have been intended to apply only to party and party taxations.

Order LXV. does not apply at all, because the retainer of the solicitor was given and the litigation commenced before the Rules of 1883 came into operation. That being so, the retainer of the solicitor conferred on him an implied authority to do that which was best for the interest of the client, provided that he did not commit the client to an extraordinary expenditure, and that he

(1) Order LXV., rule 27: "The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature (*inter alia*)." Sub-s. 44: "No retaining fee to counsel shall be allowed on taxation as between party and party."

Sub-s. 48: "As to refresher fees, when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—

To the leading counsel	from 5 to 10 guineas.
To the second, if three counsel	„ 3 to 7 guineas.
To the third, if three counsel, or the second if only two	„ 3 to 5 „

The like allowances may be made where the evidence in chief is not taken *vivâ voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used."

acted in other respects *bonâ fide*. A solicitor can compromise an action without the express authority of the client, if the client has not forbidden him to do so; *Gray* v. *Gray* (1); *Fray* v. *Voules* (2); *Swinfen* v. *Swinfen* (3). No doubt some limitations on the authority of a solicitor have been established. He cannot incur extraordinary expenditure without the express authority of the client, and he must shew that the client understood the difference between costs as between party and party and costs as between solicitor and client, and that the particular extraordinary expense would, even if he was successful, not be allowed as between party and party, and that in any event the client would have to pay it himself: *In re Snell* (4); *In re Blyth and Fanshawe* (5); *In re Broad and Broad* (6). It is not, however, necessary that he should shew that he gave this information to the client, if it is clear that the client knew it already. Here it is plain that the directors were fully aware of it. And, even if the board of directors of the *Association* did not formally authorize the payment of these refreshers, all the directors knew that they were being paid, and they acquiesced. The board were really bound by acquiescence and the *Association* were therefore bound.

Cozens-Hardy, Q.C., and *English Harrison*, for the *London Financial Association*:—

The introductory words of rule 27 shew that it applies throughout to all taxations, whether as between party and party or as between solicitor and client, unless there is anything in any particular sub-section to limit the application of that sub-section. For instance, sub-sect. 44 is expressly limited to a taxation as between party and party. Sub-sect. 8 expressly applies to taxations both between party and party and between solicitor and client, and sub-sect. 29 applies only as between party and party; but the application of sub-sect. 48 is in no way limited, and is governed by the introductory words of the rule. The practice as to refreshers before the Rules of 1883 was in substance the same, as is shewn by the above correspondence between the Masters, and it was recog-

(1) 2 Roll. Rep. 62.
(2) 1 E. & E. 839.
(3) 1 C. B. (N.S.) 364.
(4) 5 Ch. D. 815.
(5) 10 Q. B. D. 207.
(6) 15 Q. B. D. 252.

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nised by *Jessel*, M.R., in *Harrison* v. *Wearing* (1), and by *Hall*, V.-C., in *In re British Imperial Assurance Corporation* (March 23, 1882). The rules of 1883 were made with knowledge of the old practice, and they adopt it.

A solicitor has no implied authority from his client to make a different bargain with counsel as to the amount of his refreshers. There are, no doubt, many cases in which it has been held that an agent is, by virtue of his employment, authorized to deal according to the custom of the market in which he is to deal. But, when there are written regulations, the agent must abide by them in the absence of the express authority of his principal to to the contrary. *Primâ facie* the rule fixes the amounts of the refreshers which are to be allowed; the solicitor must prove affirmatively that the client authorized a larger expenditure. It is not enough to shew that the client was aware of the expenditure, and took the benefit of it; it must be shewn that the solicitor explained to him that it was an extraordinary expenditure, which would not be allowed as between party and party, so that, even if he was successful, he would have to pay it out of his own pocket, and that with this knowledge he expressly sanctioned it. If the board of directors knew that refreshers were being paid, they cannot be taken to have known that the amounts paid were in excess of those fixed by the rule. But there is no evidence that the refreshers were assented to by the board. The amounts of refreshers must be to some extent regulated by the amounts of the fees on the briefs: *Smith* v. *Wills* (before *Pearson*, J., August, 11, 1885). The solicitor ought to arrange with counsel the amounts of their refresher fees when he delivers their briefs. This was not done in the present case. Nothing was arranged about the refreshers till the second week of the trial.

Cookson, in reply:—

If the words "all taxations," at the commencement of rule 27 are to prevail, they must govern every sub-section. But sub-sect. 29, which deals only with "costs to be paid or borne by another party," shews that this cannot be so. Again, if this construction be right, it would have been unnecessary in sub-sect. 8

(1) 11 Ch. D. 206.

to say "either between party and party or between solicitor and client." The case referred to before *Hall*, V.C., applied to payment of costs out of the assets of a company in liquidation, as to which a stricter rule would be observed than in other cases. In the present case the Plaintiffs selected their own leading counsel, knowing that he would only act on special terms, and they must be taken to have known that the amount of the refreshers paid to him would be unusual. The authority of the solicitor to pay those special fees flowed from the special authority given to him to retain that particular counsel. And the incurring of unusual expense is justified in a case of unusual magnitude and importance. It is clear that all the directors knew of the difference between party and party costs and solicitor and client costs. The large fee on the brief shewed that the particular counsel selected had been retained on unusual terms.

As to the consultation fees—

Cookson, Q.C., and *Levett*, for the solicitor:—

This point also depends very much upon the authority given to retain the particular counsel. For such long consultations larger fees than the ordinary consultation fee should be allowed. The rules do not fix any amount.

Cozens-Hardy, Q.C., and *English Harrison*, for the *Association*:—

This is only a question of *quantum*, and it is a matter within the discretion of the Taxing Master. He has exercised his discretion, and the Court will not interfere. He has in some cases allowed more than the ordinary fee for consultations. There is no rule that a consultation is not to last more than half an hour. The Taxing Master is not bound by a hard and fast rule laid down by the clerk of a particular counsel. Sub-sect. 38 of rule 27 authorizes the Taxing Master, in fixing the amount of fees which are within his discretion, to take into consideration the other fees to counsel.

Cookson, in reply:—The Taxing Master has not really exercised any discretion in the matter. The reasons which he has given shew this.

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PEARSON, J.:—

The question is whether the Taxing Master has acted rightly in disallowing, as between solicitor and client, refreshers paid to counsel greater in amount than the sums mentioned in sub-sect. 48 of rule 27 of Order LXV. of the Rules of 1883. [His Lordship read sub-sect. 48.] The circumstances of the case, so far as they relate to this point, may be stated very shortly. About the year 1879 the *London Financial Association* were minded to bring an action against Messrs. *Kelk*, and divers other persons, who had been directors of the *Association*, on the ground that there had been some *ultrà vires* proceedings with regard to certain moneys with which those persons had been intrusted. There were a great many defendants to the action, who stood in different positions, and the sum involved was something like half a million of money. The question whether the action should or should not be brought had been the subject of most careful consideration by the directors of the *Association*, who were well aware that any litigation of the kind necessarily would be prolonged and costly. It appears that with reference to this litigation the board of directors had been newly constituted, and that eventually, during the progress of this litigation, it consisted of three gentlemen only, and the first thing which they did was to retain Mr *Harrison* specially, for the purpose of investigating the matter and advising them whether or not the proposed litigation would be likely to result favourably to the *Association*. They intrusted to Mr. *Powell*, one of their number, and Mr. *Harrison*, the investigation of these matters, and, finally, on their report, they determined to embark in the litigation, and the action was commenced. There is no question as to the proper origin of the litigation, as to Mr. *Harrison* having had full instructions to do what he did in commencing it, nor as to the skill and labour which he bestowed on all the proceedings. The action came on for trial before Vice-Chancellor *Bacon* in November, 1883, and the trial lasted for twenty-nine days, and eventually the Vice-Chancellor dismissed the action with costs. Thereupon, of course, the Plaintiffs had to pay the costs of the Defendants, and they had also to pay their own costs of the action, and it is upon their own bill of costs, as between themselves and Mr. *Harrison* their solicitor, that the

question now arises. In my opinion there is nothing which in any way reflects upon Mr. *Harrison's* conduct, and I gladly exonerate him from anything like blame in the matter. It appears that, in marking the fees of the counsel who were employed for the Plaintiffs, he disregarded the scale for refreshers laid down in sub-sect. 48, and paid those learned counsel refreshers to an amount to which he thought they were fairly and properly entitled, considering the enormous mass of paper which there was in the case, the time during which it lasted, and the labour which was necessarily thrown upon every one of them, in order that he might discharge his duty properly at the trial. On the taxation the Plaintiffs took the objection that the refresher fees which Mr. *Harrison* had paid were in excess of those which he was entitled to allow under the rule, and the Taxing Master assented to that objection, and has reduced the refreshers in accordance with the rule, making, as to some of them, with the assent of the Plaintiffs, a little more liberal allowance than that which is made by the rule.

The question I have to decide is, first of all, whether the Taxing Master is bound by sub-sect. 48 to say that a solicitor cannot as against his client charge, and is therefore not entitled to pay, larger refresher fees than those stated in sub-sect. 48. If that rule applies to all taxations, as between solicitor and client as well as between party and party, then, I conceive, the hands of the Court are tied. If the rule is binding upon the Taxing Master I must hold that it is binding upon me also.

It is said on behalf of Mr. *Harrison*, first, that the rule applies only to party and party taxations; and, secondly, that, even if it applies in an ordinary case when costs are being taxed as between solicitor and client, it does not apply to extraordinary cases like the present, in which from the nature of the action it may be fairly said that the refreshers mentioned in the rule are not sufficient fairly and properly to remunerate the counsel engaged in the case. That sub-sect. 48 applies to taxations between solicitor and client I do not entertain any doubt. Rule 27, of which sub-sect. 48 is a part, commences thus: "The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judica-

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ture." Words could hardly be wider to say that the whole of rule 27 applies to taxations between solicitor and client, just as much as to taxations between party and party. And, without going through all the sub-sections, it is to be observed that in sub-sect. 44 there is an express exception, which seems to shew plainly that the rule as a whole was meant to apply to taxations as between solicitor and client. Rule 44 says that, "No retaining fee to counsel shall be allowed on taxation as between party and party." It excepts a retaining fee from the general rule in the case of a taxation between party and party, because the rule was intended to apply to all taxations, whether between party and party or between solicitor and client. I must hold, therefore, that sub-sect. 48 applies to taxations as between solicitor and client, and I am confirmed in that view by the correspondence between the Masters, which Mr. *Cozens-Hardy* has read, and which was referred to by *Jessel*, M.R., in *Harrison* v. *Wearing* (1), and which shews conclusively that in the year 1863 (twenty years before these rules were passed), when I may say that refreshers were comparatively unknown in the old Court of Chancery, but were common, or at least becoming common, on the other side of *Westminster Hall*, no doubt seems to have been entertained that the rule with regard to refreshers applied between solicitor and client just as between party and party; and the rule then acted upon by the Masters of the Court of Queen's Bench was, that ten guineas was to be the maximum amount of a refresher fee, but that the Master had a discretion to allow less if he thought fit. The rule of 1883 fixes the maximum amount at ten guineas, and I am of opinion that the Taxing Master was right in saying that he had no power to allow more than ten guineas without the consent of the Plaintiffs.

It is said, however, that there was some consent on the part of the Plaintiffs. But, inasmuch as the rule has fixed ten guineas as the maximum refresher to be allowed, any payment by a solicitor of a larger refresher is, to my mind, a payment of an unusual and extraordinary nature, and, therefore, the rule which the Court has laid down applies, viz., that a solicitor cannot properly charge such a payment against his client, unless, before

(1) 11 Ch. D. 206.

he makes it, he informs the client that he is about to do so and obtains his client's assent to his doing it, and further informs him that it is an extraordinary expense, and that, even if he is successful, it will not be allowed on taxation as against the opposite party, but that, under any circumstances, the client will have to pay it out of his own pocket. I cannot find anything in the evidence to justify me in saying that any such information was given to the board by Mr. *Harrison* before the refreshers were paid or at the time when they were paid. And it is a remarkable thing, which to my mind confirms that view, that when the fees upon the briefs, which were necessarily very large, were settled, the amount of the fees was stated by Mr. *Harrison* in a letter to the board, in which he also asked for a payment on account of those fees on the ground that, according to the ordinary etiquette, they would have to be paid at once. The fees were all stated to and approved by the board, although they were large, and no objection is now taken to the payment of them. But not a word was said in that letter about refreshers, and afterwards, when the amount of them was stated in a letter to Mr. *Galsworthy*, one of the directors, by Mr. *Harrison*, Mr. *Galsworthy* at once expressed his astonishment at the amount of the refreshers, and said he was afraid that the board would take exception to them. In answer to that (and there were three or four subsequent letters from Mr. *Harrison*) he never alleged that the board had already agreed to pay the refreshers, but rested the propriety of them upon the power to assess the amount of them, which flowed from Mr. *Harrison's* retainer. Under these circumstances I cannot hold that the board had any knowledge either of the amount of the refreshers, or that a large proportion of them would in any event have to be paid by the *Association*.

It is said that in a case of such magnitude and importance, and considering the position of the counsel who were employed in it, the board must be held to have known that refreshers of large amount would have to be paid. If I were to assume that the board knew that refreshers would have to be paid, I think I should be bound also to assume that they knew that the refreshers which they would have to pay would be those stated in the rule and no others, because, until they had authorized the

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payment of larger refreshers, no others could properly be paid by the solicitor. I must therefore hold that the Taxing Master was right, and that I cannot review his taxation upon this particular head. I am bound, just as he was, by the rule which fixes the amount of refreshers.

Mr. *Cookson* very properly argued that the amounts of the refreshers mentioned in the rule are so small that they could not properly apply to a case of this magnitude, and to a great extent I agree with him. But I can find nothing in sub-sect. 48, or in any of the other rules, which shews that the Taxing Master has a right to go beyond sub-sect. 48, and, if he has not, I have no such right. It may well be that sub-sect. 48 was drawn so as to suit the majority of cases, leaving it to clients and their solicitors to decide for themselves when the amounts mentioned in it shall be exceeded. I admit that it is with some regret that I come to this conclusion in the present case. It must not be supposed that I desire to make any objection to the scale as I find it. The Court may often in a particular case regret being compelled to decide in conformity with some statutory enactment, even while it thinks that the enactment is in the main most beneficial and most in favour of honesty. Still, I do not hesitate to say that, if the matter were open to me, considering the nature of this case, how long the trial lasted, and the mass of papers, I should have felt no difficulty in allowing larger fees than those which are mentioned in the rule.

The other question relates to the amount of the fees to be allowed for consultations. Some of the consultations, as was natural in a case of this magnitude, occupied one hour, an hour and a half, or two hours, and on one occasion as much as two hours and a half were occupied. It was urged that, under those circumstances, larger fees than the ordinary fee for a consultation ought to be allowed, and that it could not be expected that counsel should give up so much of their time on the terms of being paid only the fee for an ordinary consultation, which may not last, and very often does not last, five minutes. But I think that Mr. *Cozens-Hardy* has given the right answer. The amount of the fee to be allowed for a consultation is a matter within the discretion of the Taxing Master, and it has never been the

practice of this Court to review his taxation with regard to the *quantum* of a fee which he has allowed. If the Taxing Master has gone wrong in principle the Court will interfere; but where he, having a discretion, has exercised it, and the only objection is to the amount which he has allowed, the Court will not interfere. The Taxing Master's answer to the objection shews that he has exercised his discretion, after considering all the circumstances of the case, and I do not feel myself at liberty to interfere with that exercise of discretion.

Cookson, Q.C., and *Levett*, for the solicitor:—

The claim for interest on moneys disbursed, made under sect. 17 (1) of the *Attorneys and Solicitors Act* of 1870 ought to have been allowed. Although the solicitor could not sue for his costs before he had delivered a bill to the clients, yet *Clayton's Case* (2) applies, and he was entitled to appropriate the sums paid to him by his clients generally on account to the payment of costs due to him by them, though not actually payable. If this is done, a considerable balance will remain due to him in respect of disbursements, and on that balance he is entitled to interest.

Cozens-Hardy, Q.C., and *English Harrison*, for the *Association*, were not heard.

PEARSON, J.:—

I think the words of sect. 17 are too strong. The sums paid by the clients to the solicitor were sufficient or nearly sufficient to keep down all the disbursements which he had made out of pocket. He had not delivered any bill of costs, and I do not think that he had any right to appropriate the sums which he had received to the payment of his costs. I am satisfied that sect. 17 was not intended to alter the previous practice. It was only intended

(1) Sect. 17. "Subject to any general rules or orders to be hereafter made, upon every taxation of costs, fees, charges, or disbursements, the Taxing Officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client, and on moneys of the client in the hands of the attorney or solicitor and improperly retained by him."

(2) 1 Mer. 572.

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that, if a solicitor had really advanced money out of pocket for his client, the Taxing Master might in a proper case allow him interest on those advances.

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From this decision Mr. *Harrison* appealed. The appeal came on for hearing on the 12th of May, 1886.

Cookson, Q.C., and *Levett*, in support of the appeal.

Cozens-Hardy, Q.C., and *English Harrison*, for the Respondents.

The arguments were similar to those used in the Court below. The following additional cases were cited: *In re Chapman* (1); *Edgington* v. *Fitzmaurice* (2); *Cargill* v. *Bower* (3).

1886. May 27. COTTON, L.J.:—

The question which we have to consider is, whether the learned Judge was right in affirming the Taxing Master's decision that he could not allow any payment for refreshers beyond that which was fixed by Order LXV., rule 27, sub-sect. 48; he (the Taxing Master) not at all entering into the question of whether the amount paid was reasonable or not. He simply said: I have no discretion in the matter; I am bound by the order; and therefore he disallowed them. There is another matter as regards the sums included in the bill for payments for consultations, but I will first take the question of refreshers, which is for a very large amount.

The first question which was argued, and which we must decide, is whether Order LXV., rule 27, and the scale there fixed for refreshers, does apply to this taxation. It was contended by the Appellant that it did not. It was said that this was a taxation under the statutory jurisdiction of the *Solicitors Act*, and that it was not, therefore, a taxation to which these Rules and Orders applied. It was said, I think, that it must be a taxation in some proceeding in the High Court, and, this not being so, that the rule does not apply at all.

(1) 10 Q. B. D. 54. (2) 29 Ch. D. 459.
(3) 4 Ch. D. 78.

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Now Order LXV., rule 27, is this: [His Lordship read rule 27, sub-sect. 48.]

In my opinion, it must be considered that this rule applies to the present taxation. The taxation was before a Master of the Supreme Court of Judicature—that is to say, the ordinary Taxing Master; and although it was not a taxation in the action, yet the taxation was in the Supreme Court; and rule 27 says that the special allowances are to apply to all proceedings in the Supreme Court of Judicature. In my opinion we cannot possibly hold that that direction does not apply to a taxation which takes place under a common order, or a special order obtained by a client against a solicitor, in the jurisdiction given by the *Solicitors' Act.*

But then we come to another question. In rule 27, sub-sect 48, there is in terms no such restriction as there is in some of the other sub-divisions as to payment of fees, as to no others being allowed. I doubted at first whether we could consider this restrictive. But it must be so, because there is a maximum and a minimum fixed, and the mere fixing of the minimum and maximum does prevent any sum beyond the maximum being allowed by these rules; otherwise it would be useless to fix a maximum and minimum, as is done as regards these refreshers.

We then come to another question, which was certainly not contested by the learned counsel for the Respondents. If there is an agreement, this rule does not bind; and the rule does not prevent parties making an agreement. In modern legislation it is sometimes said that any agreement to the contrary shall be inoperative, and parties are thus prevented from exercising the free right of bargaining with each other. But here there is nothing of that kind. There is nothing to prevent any agreement being made between the client and his solicitor whom he employs, or to prevent the client from giving the solicitor authority to do something contrary to what is provided for by these rules. The question therefore really is whether under the circumstances of this case, and on the evidence, the Court can come to the conclusion that there was authority given to Messrs. *Harrison* to pay more for refreshers than the limit fixed by the rule. Now, that there was in terms authority to pay more was

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not really contended, because the rule was not in existence at the time the authority was given to Messrs. *Harrison* to employ the counsel; but still, although that is so, there may be either an express authority, or there may be, from the circumstances and what expressly took place between the parties, an implied authority to give special fees larger than those which are mentioned in this subdivision of this order. We must therefore consider this case.

On the evidence it is uncontested that the *London Financial Association*, that is to say, their board, felt the magnitude of the case, and, as reasonable men, under such circumstances, they were desirous that they should employ counsel of the greatest eminence and the greatest skill, and they fixed upon the present Solicitor-General as their leading counsel.

Now, in my opinion, upon the evidence they did know that, as regards that counsel, it would be necessary to give special fees; that is to say, that in his position he was not a counsel whom they could otherwise employ; and they were anxious to have, not only him, but other counsel attending constantly to this important case; and, in my opinion, they must be taken to have known, and the result of the evidence is that they did know in fact, that special fees must be paid to him. Therefore, it is not a case of mere ordinary employment of a counsel, even although the client selects him, but it is a direction to employ this particular counsel, and, in my opinion, with the knowledge that in order to obtain his services and attention to the case throughout, it would be necessary to give him special fees.

This rule came into operation after the commencement of the action, but there is no evidence that it was communicated to the board by the solicitor. But, in my opinion, when they, with the knowledge which they possessed of what was really necessary in order to secure the services of a counsel like Mr. *Davey*, who would require special fees, directed Mr. *Harrison* to retain this particular counsel, they must have given him authority to give that counsel such special fees—a special fee of fifty guineas, without which he would not have gone into Court at all, and such special fees by way of refreshers as might be necessary to secure his services. That is the conclusion at which

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I have arrived on reading the evidence [to which his Lordship referred]—not that there was an express authority given to Mr. *Harrison* to pay these refresher fees of fifty guineas, but from the circumstances under which he was authorized to employ the leading counsel, and the knowledge which the board had—because they all had that knowledge—they authorized the solicitor to pay more than the ordinary fees—to pay such special fees by way of refresher or otherwise as might be reasonably necessary in order to secure his services. I say this, because, in my opinion, we cannot absolutely allow these refreshers of fifty guineas a day. The Taxing Master has not, as regards these matters, entered at all into the question, which is always one for his consideration, as to what the *quantum* ought to be. He simply said: I cannot look at this, I cannot go beyond ten guineas. And, therefore, it must go back to the Taxing Master to review his taxation.

Then we come to another question. There are refreshers largely exceeding the amount fixed by the order given to the other counsel. Was there any authority to give those refreshers, or refreshers to that amount? As I understand, it is put upon this—that the fees paid to junior counsel generally bear a certain proportion or ratio to the fees paid to the leading counsel. Undoubtedly that is the case as regards the ordinary fees paid to the leading counsel—that is to say, that the fees paid to the junior would, as a rule, be in a certain proportion to the ordinary fee which the leading counsel had. I think it is a well-established rule. Whether that rule applies to special fees paid to the leading counsel, which from his position are usually paid to him, and which he may be said to require, because he does not go into Court without them, I doubt, and I do not think that was my own experience; but this is certain to my mind, that the rule, if a rule, is one which a client, if he is to be bound by it, ought to have been informed of, so that it might be ascertained whether he was willing that authority should be given to the solicitor to pay such fees. On the evidence here I cannot say that it is established by Mr. *Harrison* that any such information was given to the board as regards the fees of the junior counsel. They largely exceed what was fixed by the rules; and without special authority, which, in my opinion, exists as regards the special fees, whether by refresher or otherwise, to the leading

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counsel, I think the Master was right in holding that he could not allow to Mr. *Harrison* the payments by way of refreshers which were made to the junior counsel. It all depends upon that rule; and without express authority, and without express information as to that rule, in my opinion, the solicitor would not be authorized under the circumstances of this case, and without special contract, to pay these fees to the junior counsel.

There is one other point which I will mention, which I have postponed to the end of the consideration of the refreshers, and which is this. There are authorities, and I think reasonable authorities, that a solicitor ought to inform his client that fees will not be allowed as against the other party on taxation as between party and party. Here it is made out on the evidence that information was given by Mr. *Harrison* to the board of directors—to the two gentlemen who, during the greater part of the litigation, were the only members of the board. I doubted whether he ought also to have informed them, when this rule came into operation, of the rule; but I think not. As I have already said, I think they knew that special fees must be paid to Mr. *Davey*. They were told that the fees paid to counsel to a considerable extent would not be allowed on taxation as against the opposite party, and when there was authority to pay special fees to the leading counsel, I think that in order to enable the solicitor to recover that payment from the client—it was not necessary for him to say, "Now here is a rule come in which limits on taxation the amount of refresher to be allowed." It might be different where the solicitor was seeking to get the benefit for himself. But here we are simply considering whether the solicitor who has paid these sums out of his pocket can recover them from his client; whether, in order to enable him to do so, it was necessary for him to say, "Even as between solicitor and client this will not be allowed without special authority from you to incur the expense." In my opinion we can make no order as to the refreshers to the junior counsel, but I think we ought to make this order, which has been sketched by Lord Justice *Lindley*, as regards the refreshers to the leading counsel: "The Court being of opinion that the directors authorized Messrs. *Harrison* to pay Mr. *Davey* such special fees by way of refresher as might be reasonable beyond the ordinary scale, refer the

taxation of those fees back to the Master with this declaration of our opinion."

With regard to the sums paid for consultation fees, no doubt the consultations were prolonged and heavy, and the case was one of almost unexampled difficulty and weight; but, in my opinion, we cannot interfere here. The Master, as I understand, has not felt himself fixed by any definite rules or orders of the Court which he thought prevented him from entering into the question as to how far these fees were reasonable. He has held that they were not reasonable sums to be paid, and it would be wrong, even in a case like this, to interfere, contrary to our rule, with the discretion which must be left to the Taxing Master to determine what amount of fee in the particular case is reasonable. As far, therefore, as the consultations go, we cannot interfere with the decision of Mr. Justice *Pearson* nor with the discretion of the Taxing Master. We alter the decision simply on the question of the refreshers of the leading counsel.

In that state of the case the Appellant has to some extent succeeded and to some extent failed, and the same would have been the result before Mr. Justice *Pearson* if he had taken what we consider the correct view of the law applicable to the facts of this case. Therefore, in my opinion, and I believe Lord Justice *Lindley* agrees with me, the proper order will be that which I have mentioned, and that neither side should have any costs either here or in the court below.

LINDLEY, L.J.:—

I am of the same opinion. The case having been so elaborately gone through by Lord Justice *Cotton*, very few observations from me will suffice to indicate the reason why I concur in the order which has been pronounced.

In the first place, the Taxing Master and Mr. Justice *Pearson* proceeded in this matter as if they had no discretion at all by reason of Order LXV., rule 27, sub-sect. 48. They held that that rule was imperative, and, as I understand their view, would be applicable notwithstanding any agreement or authority which the client might have entered into with the solicitor.

That appears to me to be going a great deal too far; and there

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is warrant for that opinion in sub-rule 37. It is quite obvious to my mind that the Taxing Master and the learned Judge were right in saying that this sub-rule 48 applies to all taxations, whether as between party and party or as between solicitor and client; but they were wrong in saying that it is so rigid that it could not be displaced by any special agreement or any special authority.

Was there, then, in this case any special authority? Having read the evidence with great care, I have come to the conclusion there was distinct and clear authority, from these three gentle men constituting this board, to Mr. *Harrison* to engage the present Solicitor-General, with full knowledge that his services could not be had except upon the payment of special fees—fees in excess of what could be allowed and paid as between party and party if the Plaintiffs had been successful. In other words, they knew that his services could not be got without the payment to him of special fees, and they knew that in any event they would have to pay those special fees. I am convinced that the evidence warrants that conclusion.

Under those circumstances, it does appear to me that the Taxing Master ought to have considered the matter from that point of view. He ought to have considered what was fair and reasonable for Mr. *Harrison* to pay the present Solicitor-General by way of special fees in respect of refreshers, having regard to that authority; and he ought not to have taken the strict view which he did, which of course was a logical consequence of the view he took of the construction of the rules. He did not profess to exercise any discretion at all. I am not prepared to say that the directors authorized in so many terms a payment of fifty guineas per day for twenty-eight or twenty-nine days; and it will be for the Taxing Master to consider what is reasonable to be allowed, having regard to the special authority conferred, which is what I have mentioned, and which, to save all ambiguity, we will embody in a preface to our order.

Now, as regards the fees allowed to the other gentlemen, what we have to look for, as I repeat, is some similar authority; and here I confess, having read the evidence with attention, I cannot find it. I cannot find that there was any authority to do more than was usual in this case. That the retainer was authorized is

plain enough, and of course that will dispose of any question of three counsel or four counsel; but as to this matter of refreshers, it appears to me that Mr. *Harrison* proceeded upon the theory that he had implied authority to pay them according to the same rate as he had paid the leading counsel, by reason of the special circumstances to which I have alluded. I am not aware of any such rule; as far as I know, the rule is the reverse. Supposing counsel adopts the ordinary course, when he is a person of eminence, of saying that he will not go out of his own Court except on payment of fifty guineas as a special fee, or whatever it might be, that special fee does not increase the fees of his juniors. So on the Common Law side, where we know that counsel will not go off his own circuit except under a special fee, I never heard that if he went on another circuit and got a special fee that that affected the fees of his junior. It appears to me that the rule, or supposed rule, upon which Mr. *Harrison* acted does not exist; and, in the absence of any special authority to pay these special fees to the other counsel, it appears to me that Mr. *Harrison* has not established his right to charge them against his clients. In the other case, I think he has proved all that is incumbent on him to prove: he has proved that he had authority to pay such special fees, that they knew they would have to pay them, and that they could not get them from the other side; and that appears to me to be amply sufficient.

As I have already said, in order to avoid any ambiguity, the order will be drawn up in this form: "The Court, being of opinion that the directors authorized Messrs. *Harrison* to pay Mr. *Davey* such special fees by way of refreshers as might be reasonable beyond the ordinary scale, refer the taxation of those fees back to the Master."

Now, as regards consultations, I quite agree that that is not a question of principle. The Taxing Master has exercised his discretion, and we ought not to interfere with it; and, as regards the costs, I also agree with what Lord Justice *Cotton* has said.

Solicitors: *C. & S. Harrison & Co.; Markby, Stewart & Co.*

F. G. A. W.

C. A.
1886
June 9, 10.

POOLEY'S TRUSTEE *v.* WHETHAM.

[1884 P. 1602.]

Practice—Appeal—Security for Costs of Appeal.

Notice of appeal from dismissal of an action was served by the Plaintiff on the 1st of March. On the 5th of June a defendant gave notice of motion for security for costs, supporting it by an affidavit that on the 1st of June writs of *fi. fa.* for costs payable to him by the Appellant had been issued to which the sheriff returned *nulla bona*; but the affidavit did not state that the applicant had not up to that time any reasonable evidence of the Appellant's insolvency. The Appellant's briefs had been delivered and the fees paid on the 22nd of May, and on the 10th of June, when the application was heard, the appeal was only two out of the paper:—

Held, that although there was such evidence of insolvency that an order for security would have been made if applied for in due time, the application must be refused as having been made too late, when the Appellant had incurred all the costs of the appeal, though it might even then have been granted if the applicant had shewn that until the return of *nulla bona* he had no reasonable evidence of the Appellant's insolvency.

THIS was an action by the trustee in bankruptcy of *A. G. Pooley* against the *Royal Exchange Bank* and others to set aside a sale by an incumbrancer of certain interests of the bankrupt. The action was dismissed with costs by Mr. Justice *Pearson* on the 23rd of February, 1886. On the 1st of March the Plaintiff served notice of appeal on the *Royal Exchange Bank*. On the 22nd of May the Appellant's briefs were delivered and the fees paid, but it did not appear whether the Appellant himself had paid them. The appeal was then expected to come on very soon, and at the time when the present application was heard it was only two out of the paper.

On the 5th of June the *Royal Exchange Bank* gave notice of motion that the Plaintiff might be ordered to give security for their costs of the appeal. This was supported by an affidavit to the following effect: That the Applicants' costs of the action were on the 26th of May then last certified by the Taxing Master at £664 1*s.* 5*d.*; that on the 31st of May their solicitors wrote to the Plaintiff, stating that if the costs were not paid by the following morning execution would issue; that on the 1st of June

writs of *fi. fa.* were issued to the sheriffs of *London* and *Kent*; that the sheriff of *London* returned *nulla bona*, and the sheriff of *Kent* informed the solicitors of the Applicants that the Plaintiff's goods in his bailwick had all been sold under an execution in December last; that proceedings in bankruptcy had been commenced against the Plaintiff by another Defendant in respect of that Defendant's taxed costs of the action; that the Plaintiff had admitted to the deponent that he had not consulted the creditors as to the appeal, and some of the members of the committee of inspection had informed the deponent that the action was brought without the approval of the committee; that there were no assets of the bankrupt's estate available for payment of the said taxed costs.

Grosvenor Woods, for the application:—

The doubt expressed by Mr. Justice *Pearson* in *Pooley's Trustee* v. *Whetham* (1) has been removed by *Cowell* v. *Taylor* (2), but the present case is in a different position. The evidence of insolvency is abundantly sufficient, and the lapse of time does not bar us. In *Grant* v. *Banque Franco-Egyptienne* (3), where the application was refused, it was made after a day had been fixed for hearing the appeal.

Sidney Woolf, contrà:—

This application comes too late. The case is now only two out of the paper, the Appellant's briefs were delivered on the 22nd of May, and the fees paid. The expenses of the appeal have been incurred by the Appellant, and he ought not to be stopped now: *In re Indian, Kingston and Sandhurst Mining Company* (4); *Mayor of Saltash* v. *Goodman* (5); the latter of which is almost identical with the present case: *Ex parte Hutchins and Romer* (6).

[COTTON, L.J.:—We do not allow the *Weekly Notes* to be read as authority.]

It is not reasonable that the Appellant should be allowed to go on till he has incurred all the expenses of his appeal and then

(1) 28 Ch. D. 38.
(2) 31 Ch. D. 34.
(3) 1 C. P. D. 143.
(4) 22 Ch. D. 83.
(5) 43 L. T. (N.S.) 464.
(6) W. N. 1879, p. 99.

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be called upon for security, which if he cannot find, his money will have been thrown away.

Grosvenor Woods, in reply :—

We could not safely apply earlier, for we had no sufficient evidence of insolvency till the Appellant had made default in payment of the taxed costs. The result of our former application (1) was a warning to us not to make an application of this kind until we had a strong case. The *Saltash Case* (2) was very exceptional, the respondents had themselves chosen the persons who were to litigate the matter with them in a representative character. This is referred to in the judgment, and though not made the ground of it, was clearly considered material, so that the case cannot be treated as laying down a general rule. *In re Indian, Kingston, and Sandhurst Mining Company* (3) was decided on other grounds, and there is only a *dictum* on which the other side can rely. It may well be that if an Appellant is allowed to go on and exhaust his funds in paying expenses of the appeal, so that he may have no means left of giving security, he will not be ordered to give security for costs, but here it is not shewn that the Appellant himself has paid anything. This is not the case of a litigant suing for his own property, but a trustee in bankruptcy is suing to set aside a sale, two suits to set aside which had been dismissed with the consent of his predecessor, the former trustee in this bankruptcy. It is admitted that there are no assets in the bankruptcy, and that the inspectors have not been consulted about these proceedings. I ask the Court, then, to hold that this appeal is not *bonâ fide*.

COTTON, L.J. :—

This case is an extraordinary one as to the time it has occupied and the vigour with which it has been argued, but in my opinion we should be doing wrong if we were to grant the application. Notice of appeal was served on the 1st of March, and the notice of the present application was not served till the 5th of June. The rule has always been that applications for security for costs

(1) 28 Ch. D. 38. (2) 43 L. T. (N.S.) 464.
(3) 22 Ch. D. 83.

must be made promptly, not only on the ground that the Respondent should apply for security for costs before he incurs them, but on the ground that it is unreasonable that security should not be applied for till the Appellant has incurred the costs of the appeal, whether they have been paid by himself or his solicitors. This would undoubtedly have been a case for ordering security to be given if the application had been made in time. I do not mean to lay down a fixed rule; but the present application, which is made after the briefs had been delivered, not prematurely, and when the case is only two or three out of the paper, and would probably have been reached if the time of the Court had not been taken up by some heavy causes, is too late unless the delay can be satisfactorily explained. It is urged that the Applicant had not until the issue of the executions any sufficient evidence that the Appellant was insolvent. The affidavit, however, does not state that the Respondent had not till that time any reasonable evidence of the Appellant's insolvency. If that had been made out, the application, even at this late stage, might have been successful; but we are asked to draw from the facts an inference that there was not any previous evidence of insolvency, an inference to which the Applicant does not pledge his oath.

As the Appellant owes large sums for costs, we cannot give him any costs of this application.

LINDLEY, L.J.:—

I agree that this application must be refused as coming too late, though it might have been granted if the affidavit in support of it had gone further.

LOPES, L.J.:—

This application is made when the appeal is only two out of the paper, after the fees have been paid, and the costs of the appeal incurred, and the Applicant does not swear that the return of *nulla bona* was the first evidence he had of the Appellant's insolvency. I agree with the decision in *Mayor of Saltash* v. *Goodman* (1), and think that an impecunious Appellant

(1) 43 L. T. (N.S.) 464.

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ought not at this late stage to have an order made against him, the result of which may be that the expenses he has incurred will be wholly thrown away. I do not propose, however, to lay down any general rule, each case must depend on its own circumstances.

Solicitors for Applicant: *Snell, Son, & Greenip.*
Solicitors for Appellant: *Harper & Battcock.*

H. C. J.

C. A. 1886 June 22.

CHARLES *v.* JONES.

[1881 C. 259.]

Practice—Appeal for Costs—Mortgagee—Appeal by Mortgagor—Rules of Supreme Court, 1883, *Order* LXV., *r.* 1.

Although a mortgagee who has been deprived of his costs on the ground of misconduct may appeal from the order of the Judge, yet if the Judge, notwithstanding charges of misconduct, allows a mortgagee his costs, the mortgagor has no right of appeal; because the fact of the misconduct, if proved, would bring the costs within the discretion of the Judge.

THE Plaintiff in this action was the administratrix with the will annexed of *P. E. Eyton.* The Defendant *Jones* was the solicitor and confidential agent of *Eyton*, and had advanced him various sums of money on the security of shares in joint stock companies, and of a freehold estate.

The action was brought for an account of the dealings and transactions between *Eyton* and the Defendant as his solicitor and confidential agent, and for the payment of what might be found due on either side.

Judgment had been given, and the accounts had been taken in the action, by which it appeared that a balance of about £450 was due from the Defendant to *Eyton's* estate. The Plaintiff charged the Defendant with concealment of facts and misrepresentation, but no mention was made of those charges in the judgment; and the costs of the action were reserved.

When the case came on before Vice-Chancellor *Bacon* for further consideration, it was ordered that the Defendant should pay the balance found due from him, but that he should be at liberty to

retain thereout his taxed costs of the action, including his costs properly incurred as mortgagee of the testator's estate; and that he should reconvey the hereditaments comprised in his mortgage security to the Plaintiff. The shares which had been also mortgaged to him had been previously sold.

In giving judgment, his Lordship said that no notice of the complaints against the Defendant having been taken in the decree at the hearing, he could not go into them on further consideration, and that he must conclude that, no misconduct having been shewn, the Defendant was entitled to his costs as mortgagee.

From this decision, so far as it related to the costs of the Defendant, the Plaintiff appealed.

On the appeal coming on for hearing, the counsel for the Respondent objected that the appeal, being only for costs, could not be maintained.

Millar, Q.C., and *Russell Roberts*, for the Appellant:—

The costs of a mortgagee are excepted from the general rule that there can be no appeal for costs. The rule only applies to costs which are in the discretion of the Judge, and Order LXV., rule 1, which puts the costs of proceedings in the Supreme Court in the discretion of the Judge, provides that nothing therein contained shall deprive a mortgagee or trustee who has not behaved in an unreasonable manner, of his right to costs.

In this case, the mortgagee is charged with misconduct. The question whether he has been guilty of misconduct is a question of fact on which an appeal will lie. If the Judge had held that the Defendant had been guilty of misconduct, and had deprived him of costs, he might have appealed: *In re Love* (1); *In re Knight's Will* (2); *Cotterell* v. *Stratton* (3); *Turner* v. *Hancock* (4). And it follows that if the Judge refuses to deprive him of costs, the other side may appeal. We do not appeal against the Judge's exercise of his discretion, but we complain that he did not exercise his discretion at all. Moreover, in the present case, the Judge has ordered the Defendant's costs to be allowed,

(1) 29 Ch. D. 348.
(2) 26 Ch. D. 82.
(3) Law Rep. 8 Ch. 295.
(4) 20 Ch. D. 303.

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not only of the action, but his costs generally as mortgagee. Against this part of the order we have a right to appeal.

E. Ford, for other parties in the same interest.

Marten, Q.C., and *Chadwyck Healey*, for the Defendant *Jones*, were not called on.

COTTON, L.J.:—

This is an appeal against a portion of an order so far as it relates to the taxation and payment of the costs of the Defendant. The Respondent objects that by the Act of Parliament this Court is deprived of the power to entertain the appeal. Having heard the Appellant's argument, I am of opinion that we are deprived of that power. The whole question turns upon sect. 49 of the *Judicature Act*, 1873, and the Rule which has been made in relation to it. The section of the Act is as follows: "No order made by the High Court of Justice, or any Judge thereof, by consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Judge making such order." What we have to consider is, whether the right of appeal is taken away by this enactment? The argument has been pressed upon us that the Vice-Chancellor did not treat it as a question of discretion, but as one in which he was bound to give the mortgagee his costs. It appears to me that the Judge did exercise his discretion; but even if he did not, if it is a case in which the Act leaves the costs to the discretion of the Judge, it takes away the power of this Court to entertain an appeal from his decision. Therefore, the only question is whether these are costs which are left by law to the discretion of the Judge. That brings us to Order LXV., r. 1, which provides that "subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge." A small point has been raised which I may here notice, namely, that the order made by the Judge is not confined to the costs of litigation, but gives the Defendant the costs "including his costs properly incurred as mortgagee," and it was

contended that only the costs incurred in litigation were within the discretion of the Judge, and that an appeal would lie as to his general costs as mortgagee. But all his costs as mortgagee are not included, but only his costs properly incurred, and these he is entitled to under his mortgage contract. The Appellant, therefore, is not injured by this part of the order. Then the rule goes on to say, "Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." What is the meaning of that? It means that everything is to be left to the discretion of the Judge, unless a party has a right to his costs. When he has such a right it would be wrong to give the Judge a discretion to deprive him of them. The cases referred to in the Rule are cases in which there is a right to costs by positive or implied contract. In such cases, unless it appears on the evidence that this right has been lost, there is no discretion in the Judge. If there has been misconduct, then it is not taken out of the discretion of the Judge. It is no part of the contract between the mortgagor and mortgagee that the mortgagee shall lose his costs if he behaves improperly; the only exception to the Judge's discretion is where the mortgagee has a right to claim his costs. If the Judge wrongly decides that the mortgagee has acted improperly and that his right by contract is lost, then the mortgagee has a right of appeal. But if by his misconduct he has lost his right to costs, then the discretion of the Judge arises, even though the Judge does not exercise it. Therefore, even if the Appellant in the present case were to make out that the conduct of the mortgagee has been reprehensible it would come under that order, and she has no right of appeal.

LINDLEY, L.J.:—

I am of the same opinion. The question depends on the 49th section of the *Judicature Act*. By virtue of that section no appeal at all lies for costs which are within the discretion of a Judge. Therefore we have to see what costs are within the

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discretion of the Judge. That brings us to Order LXV., r. 1. By that rule all questions of costs with two or three exceptions are left to the discretion of the Judge. There is one statutory exception, which is made by sect. 67 of the Act, and then we come to the exception of the costs of trustees and mortgagees which are placed beyond the arbitrary discretion of the Judge. By the law of mortgages it is well settled that a mortgagee is entitled to his costs, and the framers of the Orders had no intention to disturb this rule. The costs are only withdrawn from the discretion of the Judge for the purpose of protecting the mortgagee or trustee; with that exception and the statutory exception to which I have alluded, and also with the exception of the verdict of a jury, all costs are discretionary. Except in the excepted cases no one has a right to costs—all are in the discretion of the Judge. Therefore I am of opinion that the 49th section applies to the present case, and that there is no appeal.

LOPES, L.J.:—

I also think that the costs in this case are in the discretion of the Judge, and that there is no appeal. By Order LXV., r. 1, all costs, with certain exceptions therein mentioned, are left to the discretion of the Judge, except where a party has an absolute right to costs. A mortgagee has an absolute right to costs unless they are forfeited by misconduct; if they are forfeited by misconduct then they are within the discretion of the Judge. In the present case, assuming that there has been misconduct, the costs are within the discretion of the Judge. Then the Act says that where the costs are within the discretion of the Judge there shall be no appeal unless leave be given by the Judge. There has been no such leave in this case; therefore no appeal can be brought.

Solicitors for Plaintiff: *Kennedy, Hughes, & Kennedy.*
Solicitors for Defendants: *R. Blackett Jones; Mead & Daubeny.*

M. W.

LYDNEY AND WIGPOOL IRON ORE COMPANY *v.* BIRD.

C. A. 1886 May 28, 31; June 1, 2, 3, 11, 24.

[1882 L. 1841.]

Company—Promoter—Secret Commission—Agents for Vendor—Practice—Costs paid to Solicitor of a Party—Order on Solicitor to refund.

Although a promoter of a company cannot be considered an agent or trustee for the company, the company not being in existence at the time, yet the principles of the law of agency and trusteeship are applicable to his case, and he is accountable for all moneys obtained by him from the funds of the company without the knowledge of the company.

The fact that a promoter is acting as agent for the vendors in getting up a company for the purchase of their property does not exonerate him from accounting to the company, when formed, for any secret profit made by him.

In estimating the amount of the secret profit for which a promoter was accountable to the company he was held entitled to be allowed the legitimate expenses incurred by him in forming and bringing out the company, such as the reports of surveyors, the charges of solicitors and brokers, and the cost of advertisements; but not a sum of money which he had expended in obtaining from another person a guarantee for the taking of shares.

J., a member of a firm of iron merchants, was a promoter of a company for the purchase of mines, and was held accountable for a secret profit which he had made in the course of such promotion. *W.*, his partner, received from him a sum of money out of the profit made by him in consideration of his guaranteeing the taking of certain shares. There was no evidence that *W.* knew of the profit that *J.* made, or knew that the sum received by him came out of the moneys of the company:—

Held, that the promotion of companies not being within the scope of the partnership, *W.* was not accountable for the profits made by *J.*, or for the money received by himself as the consideration for the guarantee.

An action being dismissed at the hearing with costs, a sum of money which had been paid into Court as security for the Defendants' costs was ordered to be paid out to the solicitors for the Defendants in part payment of the Defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the Defendants. The Plaintiffs asked for an order against the Defendants' solicitors for repayment by them:—

Held, that the Court had no jurisdiction on the appeal to order the Defendants' solicitors to refund the money, the solicitors not being present. Nor, *semble*, could such an order have been made if they had been served with notice of the application.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (1). The action was brought by the *Lydney and Wigpool Iron Ore*

(1) 31 Ch. D. 328.

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Company (Limited), against *William Bird* and *James Bird*, who carried on business under the firm of *William Bird & Co.*, claiming a declaration that the firm had received a sum of £10,800 as trustees for the Plaintiffs, and that the Defendants were jointly and severally liable to account for that sum with interest. *William Bird* died during the progress of the action, and it was continued against his executors.

The facts were shortly as follows :—

In June, 1871, Messrs. *Thomas, William,* and *James Allaway* were the owners of some mineral property in the *Forest of Dean,* known as the *Wigpool Iron Mines* and *Lydney Park Iron Mines,* which was subject to a mortgage to the *West of England Bank.* The bank called in the mortgage, and the money not being paid they gave notice that they intended to sell the property. Messrs. *Allaway* being desirous to prevent a sale of the property applied, through Messrs. *Poole & Hughes* their solicitors, to *Bird & Co.,* who were iron merchants in the city of *London,* to render them assistance. It was alleged by the Plaintiffs that it was part of the business of *Bird & Co.* to promote the formation of companies, but the Court of Appeal were of opinion that it was beyond the scope of their business to do so. *James Bird,* who was one of the partners, suggested several schemes, and the scheme which was finally accepted was the formation of a company to purchase the property.

The persons actually engaged in forming the company and bringing it out were Messrs. *Allaway,* their solicitor Mr. *Poole,* the solicitor of the bank Mr. *Prichard,* and *James Bird.* It was at first proposed that £90,000 should be paid to Messrs. *Allaway* for the property, of which £5000 was to be allotted to the payment of promotion expenses and the expenses of forming the company. Messrs. *Allaway* appear to have been satisfied with that scheme, and on the 23rd of November, 1871, they signed a memorandum shewing that they were ready to accept those terms.

On the 9th of December, 1871, a letter was written by Messrs. *Allaway* to Mr. *Poole,* their solicitor, shewing that they left it with them to settle the matter with *J. Bird,* and meetings were subsequently held between Mr. *Poole* and Mr. *Prichard,* as representing the bank on the one side, and *J. Bird* on the other, on the

12th, 14th, and 15th of December, the result of which was that a fresh scheme was finally adopted and settled, and a prospectus embodying the final agreement was ultimately issued by *J. Bird*. By this scheme it was agreed that instead of the purchase-money being £90,000, the purchase-money should be £100,000; and that a portion of that purchase-money, £10,800, should be paid to *Bird & Co.* for the promotion and for a guarantee which *J. Bird* was to give in the name of the firm to take up shares to float the company.

An agreement was accordingly signed on the 19th of December, 1871, by Messrs. *Allaway* and *C. Greenwood*, a trustee for the intended company, whereby Messrs. *Allaway* agreed conditionally on the company being formed to sell their interest in the mines, machinery, &c., to *Greenwood*, for £100,000, of which £50,000 was to be paid in cash and £50,000 in paid-up shares. It was also provided that Messrs. *Fussell, Prichard & Swann*, the solicitors to the *West of England Bank*, and Messrs. *Poole & Hughes*, the solicitors of Messrs. *Allaway*, should be the solicitors of the company. And it was further agreed that the conduct of the sales of property of the company should be in the hands of *Bird & Co.*, who should receive a commission of 2 per cent., including brokerage, on all sales. They were also to be allowed £600 per annum in consideration of their paying the salary of a competent secretary and providing all necessary clerks and offices, and paying all office disbursements. This agreement did not refer to the commission of £10,800 which was payable to *Bird & Co.*, nor to the guarantee which *J. Bird* was to give.

William Bird took no part in these negotiations, which were conducted by *J. Bird* alone. On the 30th of December, 1871, *William Bird* retired from the partnership, and a fresh partnership was constituted between *J. Bird* and other persons.

It appeared from the evidence that the prospectus was prepared by the solicitors for the proposed company, and all the business connected with the issuing of the prospectus and bringing out the company was conducted by *J. Bird* in the name of his firm.

The prospectus stated that the purchase-money was £100,000; payable in cash and shares; but made no mention of the sub-agreement as to the £10,800. It also stated that the mines had

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been examined and reported upon by *Bird & Co.*, and that there were no contracts outstanding at low prices to prevent present rates being obtained for the company. This last statement was not correct, the fact of the existence of such contracts being one of the reasons why the company was not able to carry on its business at a profit.

The prospectus further stated that no promotion money or other fees would be paid by the company, and referred to the agreement of the 19th of December, 1871, a copy of which was to be seen at the offices of the solicitors.

The memorandum of association referred to the agreement for purchase of the 19th of December, 1871, but neither the prospectus nor the memorandum or articles of association made any mention of the £10,800 which was to be paid to *Bird & Co.*, or of the guarantee.

W. Bird and *J. Bird* subscribed the memorandum of association for fifty shares each.

Meetings of the board of directors were held on the 9th and 19th of January, 1872, at which the contract for purchase was confirmed, and sealed with the seal of the company. The directors who attended those meetings were the Messrs. *Allaway*, Mr. *Spencer*, who was a nominee of *J. Bird* and qualified by him, and Mr. *Bird*, jun., who was also a nominee of *J. Bird*. The meetings were held at Messrs. *Bird's* offices.

The arrangement as to the guarantee was modified by a subsequent agreement of the 9th of January, 1872, and it was arranged that the guarantee should be given by *W. Bird* personally, for which he was to receive £5000.

Between the 20th of January and the 17th of March the sum of £10,800 was paid by the directors to *J. Bird*, and *J. Bird* paid £5000 to *William Bird* in consideration of his guarantee.

Under these circumstances Mr. Justice *Pearson* held that *Bird & Co.* were not promoters of the company, but were acting solely as agents of the vendors; that the purchase-money was not increased for the purpose of providing the commission of £10,800; that the commission was really paid by the vendors, and that *Bird & Co.* were not liable to account for it to the company: he accordingly dismissed the action.

A sum of £363 7*s.* 6*d.* having been paid into Court by the Plaintiffs as security for the costs of the Defendants, the judgment was drawn up in the following form:—

"Dismiss the action with costs, to be taxed by the Taxing Master on the higher scale, and to be paid by the Plaintiffs to the Defendants *James Bird* and the executors of the deceased Defendant *W. Bird*; and the Taxing Master is to deduct the funds in Court hereinafter directed to be paid to the Defendants respectively on account of the said costs, and to certify the balance to the Defendants respectively; and it is ordered that the funds in Court be dealt with as directed in the payment schedule hereto."

The payment schedule, which was headed "Security for Costs—Funds in Court £363 7*s.* 6*d.*—Money on deposit," contained the following direction:—"Pay money on deposit, and any interest, in part payment of Defendant *James Bird's* costs, to be taxed under this order"; and the column headed "Payees or Transferees" was filled in thus: "*Francis K. Munton* and *F. W. Morris*, copartners, solicitors for *James Bird*, Defendant."

The Plaintiffs appealed from the judgment of Mr. Justice *Pearson*, but no application was made for a stay of proceedings under the judgment, and the £363 7*s.* 6*d.* in Court was accordingly paid out to the solicitor of *James Bird* in part payment of his costs.

Napier Higgins, Q.C., and *Bunting*, for the Appellants:—

Bird & Co. were not mere agents of the vendors, but were also promoters of the company, in the formation of which they had a considerable interest. They were, therefore, in a fiduciary position to the company, and are liable to refund the commission of £10,800 which they received: *New Sombrero Phosphate Company* v. *Erlanger* (1). The prospectus, memorandum of association, and articles, were all silent as to this commission: *Twycross* v. *Grant* (2). The case is exactly similar to *Bagnall* v. *Carlton* (3). The fact that the firm acted as the agents of Messrs. *Allaway* makes no difference, they were equally promoters of the

(1) 5 Ch. D. 73; 3 App. Cas. 1218. (2) 2 C. P. D. 469.
(3) 6 Ch. D. 371.

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company. Promoter is not a technical term. Whether a man is a promoter or not is a question of fact, and depends on the evidence: *Emma Silver Mining Company* v. *Grant* (1). In the present case *James Bird*, who was the acting partner, not only settled the price of the mines, but was consulted in bringing out the prospectus and settling the terms of the memorandum and articles, and he conducted all the preliminary business in the formation of the company. He selected the stockbroker and named two of the directors. But whether the firm were promoters or not, they ought to account for the sum of £10,800. It was a secret profit made upon a secret bargain at the expense of the company, for the purchase-money was increased by that amount: *Whaley Bridge Calico Printing Company* v. *Green* (2).

We admit that *James Bird* is entitled to retain the lawful expenses of bringing out the company; but that does not include the £5000 paid to *W. Bird* for his guarantee.

W. Bird was a partner in the firm when the negotiations were proceeding, and is responsible for the acts of the firm. Moreover he received £5000, part of the £10,800, and he must have known from what source that sum was derived.

[They also cited *Nant-y-Glo and Blaina Ironworks Company* v. *Grave* (3), and *Hay's Case* (4).]

Cozens-Hardy, Q.C., *H. B. Buckley*, and *Daldy*, for the executors of *W. Bird*:—

There is no evidence that *W. Bird* knew anything of the negotiations between *James Bird* and Messrs. *Allaway*. The promotion of the company was not within the scope of the partnership business, and he was not responsible for the acts of his partner in the matter. The sum which he received was not part of the £10,800: it was paid to him by *James Bird*, as the price of his guaranteeing the allotment of a sufficient amount of shares.

Giffard, Q.C., and *Swinfen Eady*, for *James Bird*:—

The liability of *James Bird* turns entirely upon the facts of the case. The judge in the Court below heard the evidence with

(1) 11 Ch. D. 918.
(2) 5 Q. B. D. 109.
(3) 12 Ch. D. 738.
(4) Law Rep. 10 Ch. 593.

great care, and decided the issues of fact in our favour. He held that *J. Bird* was not a promoter of the company, but only the agent of Messrs. *Allaway*; that the purchase-money was not increased by the arrangement to pay *W. Bird & Co.* £10,800, and that that sum did not come out of the funds of the company, but was paid by the vendors out of their purchase-money. Therefore *James Bird* was in no fiduciary relation to the company. There is no evidence of there having been a sham contract, and there is not even any allegation in the pleadings that there was a real sale for £90,000 and a subsequent fictitious sale for £100,000. It is alleged by the Plaintiffs that *Bird & Co.* were agents for the company, and that the money they received was money of the company. But this is not a suit to rescind the contract, and the *Allaways* are not here, nor have they been examined. As between the *Allaways* and the company, the real purchase-money was £100,000. How can the company come against their agent to ask for money to be repaid on the ground that the *Allaways* ought not to have received it? In all the cases of this nature except *Emma Silver Mining Company* v. *Lewis* (1) the vendor has been before the Court. In *Whaley Bridge Calico Printing Company* v. *Green* (2) it was found that there was a sham contract, and it was held that there was money of the company in *Green's* hands; but then *Green* was the vendor, and was before the Court. It is contended that the real purchase-money was only £90,000. That is as much as to say that the real purchase-money of an estate is the net sum which the vendor has in hand after paying his agent. The true test is whether the *Birds* were agents of the company or of the *Allaways*. *Bagnall* v. *Carlton* (3) is wholly distinct from the present case, for there was in that case a contract at a lower price to the benefit of which the company was entitled. The language of the prospectus as to promotion money has been relied upon. A representation may be that no promotion money will be paid at all, or that none will be payable by the company. Here the words are "by the company." The observations of Lord Justice *James* in *Arkwright* v. *Newbold* (4) are in our favour. They shew that in order to give the company an equity there must be an

(1) 4 C. P. D. 396.
(2) 5 Q. B. D. 109.
(3) 6 Ch. D. 371.
(4) 17 Ch. D. 301, 319.

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actual bargain, and then a fraudulent increase of the price. Here, on the evidence, the price of £100,000 was fixed before a guarantee was thought of. Then it is a question of fact whether there was any guarantee by *Bird* of which the company had the benefit.

[COTTON, L.J.:—We are all of opinion on the evidence that there was a guarantee.]

This guarantee was fulfilled. The *Birds* took the shares which the company did not want, and paid for them. The company have had the benefit of this, and the parties cannot be replaced *in statu quo*. The value of the guarantee cannot be estimated. The company cannot both take the benefit of the Defendant's services and retain the remuneration. The observations of the late Master of the Rolls in the *Emma Silver Mining Company* v. *Grant* (1) shew that if *J. Bird* is to be charged not on the footing of having received moneys of the company, but as having made a secret profit, he must be charged only with the real amount of profit, deducting all sums paid on behalf of the company which the company must have paid. In *Emma Silver Mining Company* v. *Lewis* (2) and *Whaley Bridge Calico Printing Company* v. *Green* (3) a sham contract was found as a matter of fact, so those cases are inapplicable. Then was there a private profit? There was no secret bargain—it was no secret that the vendors would pay promotion money and preliminary expenses. The case is stronger in our favour than *Arkwright* v. *Newbold* (4), where nothing was said about promotion money and preliminary expenses.

Napier Higgins, in reply.

1886. June 11. LINDLEY, L.J., delivered the judgment of the Court (*Cotton*, *Lindley*, and *Lopes*, L.JJ.). After stating the facts of the case his Lordship said:—

James Bird in fact procured the formation of the company. He suggested its formation, he took an active part in the preparation of its prospectus and memorandum and articles of associa-

(1) 11 Ch. D. 918, 938.
(2) 4 C. P. D. 396.
(3) 5 Q. B. D. 109.
(4) 17 Ch. D. 301.

tion, in the appointment of two of its first directors, in the appointment of its secretary, and he procured his own firm to be engaged to conduct the sales of the company at a large commission. He fixed the purchase-money at £100,000 and stipulated for the payment of £10,800 to his own firm, and he procured the payment of that sum by the company, and he was himself a director when the last instalments of it were made. He was in truth the person who fastened the contract to pay £100,000 on the company without disclosing the fact that his firm were to get £10,800 out of the purchase-money.

The evidence when sifted shews clearly and conclusively that though the *Allaways* had not agreed to sell at £90,000, viz., £85,000 plus £5,000 for promotion expenses, they were prepared to do so, and that it was *James Bird* who ultimately settled that the nominal purchase-money was to be £100,000 of which he was to have £10,800.

On this point we are unable to take the same view of the evidence as that taken by Mr. Justice *Pearson*. He did not in our opinion sufficiently appreciate what took place on the 23rd of November, 1871, when the first memorandum was issued, nor the letter from *Allaway* to *Poole* of the 9th of December, 1871. Nor did Mr. Justice *Pearson* realize the fact that the terms as to the £100,000 and as to the £10,800 were settled at the meetings of the 12th, 14th, and 15th of December, 1871.

Having arrived at these conclusions of fact the legal principles applicable to them do not present any real difficulty. It is not correct to say that *James Bird* was the agent of the company when it did not exist, nor is it much less objectionable to talk of his being in a fiduciary relation to the company before the company had any existence. Moreover, to say that *James Bird* was a promoter of the company and therefore liable to account to it, is calculated to mislead ; for the word "promoter" is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are. In the present case *James Bird* procured the company to be formed and to be managed in such a way as to transfer from the moneys of the company to

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himself the sum of £10,800 without informing the company of that fact. The company were told that they had to pay £100,000 for the property, but they did not know that of that sum £10,800 was to go into the pocket of the man who had got the company up and who had in fact increased the purchase-money in order to get that £10,800. Under these circumstances he cannot retain the sum so got. Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases; and using the word "promoter" to describe a person acting as *James Bird* did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as if the relationship of principal and agent or of trustee and *cestui que trust* had really existed between them and the company when the money was so obtained. Nor in such a case is it necessary for the company to rescind the whole transaction of which the payment by the company of the money in question is found to be part. *Beck* v. *Kantorowicz* (1), *Emma Silver Mining Company* v. *Lewis* (2), *Bagnall* v. *Carlton* (3), and *Whaley Bridge Calico Printing Company* v. *Green* (4) are all illustrations of the foregoing principle, and in none of them was the whole transaction set aside. *In re Cape Breton Company* (5) is not opposed to these decisions. In that case a company unsuccessfully attempted to make one of its directors account for the profit he had derived by selling his own property to the company; but there the company had deliberately elected to ratify the transaction with a full knowledge of all the facts, and the director in question had not acquired the property while he was engaged in forming the company. These two circumstances induced a majority of the Court to hold that the company could have no relief. But neither of these circumstances exists in the present case.

The circumstance that Mr. *James Bird* was acting for Messrs. *Allaway* in getting up this company does not, in our judgment, exonerate him from his liability to account for the £10,800. In

(1) 3 K. & J. 230.
(2) 4 C. P. D. 396.
(3) 6 Ch. D. 371.
(4) 5 Q. B. D. 109.
(5) 29 Ch. D. 795.

procuring that money he was not acting in their interest but in his own, for though in form it was part of the price paid to them, the £10,800 was in truth to be paid out of the price to him. His liability to account to the company for this sum rests on his own conduct, not on theirs, and as an agent is personally responsible for his own torts and frauds, though committed by him for other people, so a person acting as *James Bird* did in getting £10,800 from the company without disclosing the fact, is personally liable to account for it, although, in getting up the company he may have been acting for the Messrs. *Allaway*.

Having arrived at the conclusion that *James Bird* is accountable to the company for the £10,800, the next question is, what sums are proper to be allowed him out of it. The profit actually made by him was comparatively small, and *Emma Silver Mining Company* v. *Grant* (1) was referred to in order to shew that he ought to be allowed all payments made by him in procuring the formation of the company and of the issue of its shares, and that he is only accountable for the net profit made by himself out of the transaction. But it appears to us wholly wrong to make the company pay for the issue of its own shares. No part of the capital of the company could be properly so applied. To allow *James Bird* the £5000 paid by him to *William Bird* for his guarantee would, in effect, be to make the company misapply its capital. On the other hand, *James Bird* ought to be allowed legitimate expenses incurred by him in forming and bringing out the company. These sums will include the £600 charged for the report, and the fees paid to the solicitors and brokers, and for advertisements, printing, &c.

As regards *William Bird*, we are of opinion that there is not enough evidence to render him liable for the £10,800, or any part of it. The promotion of companies was no part of the business of *W. Bird & Co.* when he was a member of it. He took no such part in the formation of the *Lydney Company* as to make him accountable to it as a promoter, and it is not proved that he knew of the arrangement as to the £10,800, or that he was in effect being paid by the company for his guarantee. As against him, therefore, the appeal must be dismissed with costs,

(1) 11 Ch. D. 918.

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but as regards *James Bird* the appeal must be allowed with costs here and below, and an order must be made charging him with the £10,800 and interest at £4 per cent., but declaring him entitled to deduct from that sum the £600 paid for the report and all sums properly expended by him in forming and bringing out the company, and there must be an inquiry to ascertain these sums.

On the 24th of June the case was mentioned again.

Napier Higgins, Q.C., and *Bunting*, for the Plaintiffs, asked that the fund in Court which had been paid to the solicitors for the Defendant *J. Bird*, might be repaid by them. The order of Mr. Justice *Pearson* directed payment of the fund in Court to Messrs. *Munton & Morris* by name; and they were, therefore, liable to repay the money now that the judgment had been reversed.

Giffard, Q.C., and *Swinfen Eady*, said that they appeared for *J. Bird*, but had no instructions to appear for his solicitors.

THE COURT consulted the Registrars as to the practice, and they stated that there was no precedent for such an order as then asked for.

COTTON, L.J.:—

In this case we reversed the judgment of Mr. Justice *Pearson*, who dismissed the action with costs, and the taxed costs of the Defendant *J. Bird* have been paid to his solicitors. These included a sum of money which had been paid into Court as security for costs. The question now raised is whether we should now order the Defendant, who has been ultimately unsuccessful, to repay the costs to the Plaintiffs, or whether we should order the solicitors to repay them.

It is impossible for us to make an order upon the solicitors, as they are not before us on this appeal. But I do not encourage any application against the solicitors to make them repay the costs, for I think such an application would fail. The order does not direct the money to be paid to the solicitors in their own right, but only on behalf of *James Bird*, just as if he had

given them a power of attorney and the money had been paid out to them as his attorneys. The first direction is that the Plaintiffs should pay the costs to the Defendant *J. Bird*, and that the Taxing Master should deduct the fund in Court thereafter directed to be paid to him. The payment schedule only gave effect to that order, by directing the money in Court to be paid "in part payment of *J. Bird's* costs." And then follows a direction as to the persons to whom the payment is to be actually made on behalf of *J. Bird*, namely, his solicitors. There was no separate independent order for payment to the solicitors, but only a direction as to the mode in which the payment of *J. Bird's* costs are to be made. The solicitors received the money, not as principals, but as *Bird's* agents, and he is the person to refund it.

LINDLEY, L.J.:—

I am of the same opinion. It is clearly impossible to make an order on the solicitors unless they are served with a notice of motion. Whether it would be right to make such an order on a substantive application against the solicitors it is not necessary now to decide. The principle has been stated by Lord Justice *Cotton*. If an order is made to pay money to a person, and it is in fact paid to his agent, the person to whom it is ordered to be paid is responsible for the money, just as if he had executed a power of attorney to the agent to receive it.

LOPES, L.J.:—

It is clear that no order can be made against the solicitors on this application. But I agree in thinking that the money was ordered to be paid to the solicitors on behalf of *James Bird*, and *James Bird* is therefore alone liable to repay it.

Solicitors for Plaintiffs: *Hoddinott & Davis.*

Solicitors for Defendants: *Munton & Morris; Freeman & Bothamley.*

M. W.

C. A.
1886
June 24.

In re CAMPBELL'S TRUSTS.

Will—Construction—Gift per Stirpes or per Capita.

A testator gave some houses to trustees upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and to divide the remaining moiety between the children of the one so first dying; and after the decease of the survivor of the testator's children, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who should attain twenty-one in equal shares and proportions:—

Held (affirming the decision of *Pearson*, J.), that the proceeds of sale were divisible among the grandchildren *per stirpes*, and not *per capita*.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (1).

The question for the decision of the Court arose upon the construction of the will of *Stewart Campbell*, dated the 23rd of March, 1822. The testator gave to trustees five houses in *St. James's, Westminster*, upon trust to receive the rents thereof from time to time and thereout to pay to his wife the sum of £30 per annum during her life, and as to the residue thereof to divide and pay the same in equal moieties to his son, *John Campbell*, and his daughter, *Ann Frances Campbell*, to and for their respective use and benefit, and, after the death of the testator's wife, upon trust to pay the same equally to his said children during the terms of their lives; and from and after the death of either of them without issue living, then upon trust to pay the whole thereof to the survivor during the life of such survivor for his or her absolute use and benefit; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety unto the survivor, and to divide the remaining moiety between all and every the child or children of the one so first dying. And the said testator directed that if it should happen that his trustees should by sale or otherwise receive any sums of money in lieu of receiving the rents and profits of the said trust property the said trustees should invest the same as therein

(1) 31 Ch. D. 685.

mentioned, and should stand possessed thereof and of the interest and dividends thereof upon the trusts theretofore declared of and concerning the rents and profits of the said trust premises. And the testator declared that from and after the decease of the survivor of them his said children the said trustees should hold the said property in trust to make sale of the said trust premises and divide the purchase-money equally amongst all and every the child or children of each of them the said *John Campbell* and *Ann Frances Campbell* who should live to attain twenty-one years, in equal shares and proportions, to be paid and payable as and when such child or children should respectively attain twenty-one years.

The testator died on the 24th of February, 1823.

Under the provisions of an Act passed in the 7th year of *George* IV., two of the houses were sold to the Commissioners of Woods and Forests and the purchase-money was paid into Court.

The testator's son, *John Campbell*, died on the 13th of October, 1878, having had eight children, all of whom attained the age of twenty-one years.

The testator's daughter, *Ann Frances Campbell*, married *James Fleming*, and had one child only who attained twenty-one, and died on the 29th of October, 1885. After the death of *James Fleming*, his widow, *Ann Frances Fleming*, married *H. Hill*. At the time of the presentation of the petition Mrs. *Hill* was eighty-two years of age. She had never had any other child.

The petition was presented by some of the children of *John Campbell*, some of their mortgagees, and Mr. and Mrs. *Hill*, for the division of the moiety of the fund in Court. The question was whether the division was to be *per capita* or *per stirpes*, that is, whether the fund should be divided in ninths among the eight children of *John Campbell* and the one child of Mrs. *Hill*, or whether Mrs. *Hill's* child took a moiety, the other moiety being divisible in eighths between the eight children of *John Campbell*.

Mr. Justice *Pearson* held that the moiety in question must be divided *per stirpes;* and from that decision the Petitioners appealed.

Cozens-Hardy, Q.C., and *Method*, for the Appellants :—

If the division was intended to be *per stirpes*, there was no

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reason for postponing the division till the death of the survivor of the son and daughter: *Abrey* v. *Newman* (1); *Smith* v. *Streatfield* (2); *Nockolds* v. *Locke* (3). The nature of the property was no reason for a postponement, because the trustees had power to sell at any time. There was a reason for dividing the income *per stirpes* so long as one of the testator's children survived, otherwise there would have to be an adjustment of income from year to year, but when the capital became divisible there was no such reason. If the construction put upon it by Mr. Justice *Pearson*, is correct, there would have been an intestacy as to one moiety, if either of the testator's children had died without issue.

Cookson, Q.C., and *Kenyon Parker*, for the representative of the deceased child of Mrs. *Hill*:—

The division ought to be *per stirpes*. The nature of the property was sufficient reason for postponing the division until the death of the survivor of the son and daughter. We admit that in the event of the son or daughter dying without issue there would be an intestacy as to a moiety of the capital; but there is no absurdity in supposing that the testator desired that it should go to the persons entitled by the *Statute of Distributions*. The other construction leads to this unreasonable result, that if the testator's daughter had died first, her son would have been entitled to receive half the income during the life of the testator's son, and then his interest would have been cut down to one ninth of the property. The word "equally" points to a division of the proceeds of the sale into two equal parts, before it is divided among the grandchildren. *Brett* v. *Horton* (4) is very similar to this case. *Smith* v. *Streatfield* is really in our favour, because there are words which are equivalent to "respectively."

B. B. Rogers, and *G. Church*, for other parties.

Method, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Pearson* on the construction of a will which does not clearly express the inten-

(1) 16 Beav. 431.
(2) 1 Mer. 358.
(3) 3 K. & J. 6.
(4) 4 Beav. 239.

tion of the testator. The question we have to decide is, whether the proceeds of the sale of certain houses given by the will are to be divided *per stirpes* or *per capita*. It turns on a very few words in the will. The testator in the earlier part of the will in tolerably clear words gives the income of the property between the objects of his bounty *per stirpes*. He gives it between his son and his daughter, and after the death of either of them leaving issue living, then upon trust to divide it in moieties between the survivor and the children of the deceased son or daughter. Then after the death of both he directs the property to be sold and the proceeds to be divided in the following words:—[His Lordship read the ultimate gift.] Undoubtedly there is a good deal of difficulty in these words—the testator says the funds are to be divided among all the grandchildren in equal shares and proportions; but having regard to the division into moieties which he had previously directed, I think there is sufficient to shew that he meant the proceeds to be first divided into two lots, and then each lot to be divided equally between the children in the respective families. He says the children of "each of them," as though he were speaking of two classes of children. It is the same as if he had directed the division between "the children of my son and daughter respectively," that is between two classes, one the children of his son, the other the children of his daughter. The fact is, that the person who drew the will tried to express in one sentence what he ought to have put into two.

It is said that on this construction, in the event of the son or the daughter having no issue there would be an intestacy as to one moiety. The testator probably did not contemplate that contingency, and I think we ought not to be debarred from giving effect to the natural construction of the will, because it would lead to an intestacy in one event. The real principle is stated by Sir *W. Grant*, in *Smith* v. *Streatfield* (1), and I think that in this will there are words equivalent to giving the capital to the children of the son and daughter "respectively." In my opinion the order of Mr. Justice *Pearson* was right, and the appeal must be dismissed.

(1) 1 Mer. 358.

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LINDLEY, L.J.:—

I am of the same opinion. The meaning of the will is certainly obscure, but after studying the whole will and looking at the expressed intention of the testator in the other parts of it, I think we may arrive at the correct interpretation. The testator gives the rents of the houses in equal moieties to his son and daughter; and after the death of either without issue the whole to the survivor; but in the event of one of them dying leaving issue the income is still to be divided into moieties, and one moiety is to go to the children of the son or daughter so dying. Then, after the death of both his son and daughter, he directs a sale of the property, and then follows the gift which we have to construe. Mr. *Method* has pointed out that according to the construction that the property is to be divided *per stirpes*, in one event there would be an intestacy. That is true, but on the other hand we find the dominant idea of the testator in the previous part of the will is to divide the income equally between the two *stirps*. And I think that in the last clause the word "each" must be read as equivalent to "respectively," and that Mr. Justice *Pearson* came to a right conclusion.

LOPES, L.J.:—

We have to put upon this gift such a construction as will carry out the intention of the testator. One thing is clear, that while he deals with the income he intends a stirpital division, and that this method of division was to continue after the death of one of the first takers. I think the same intention is shewn after both are dead, when the *corpus* is to be divided. He dealt with the *corpus* on the assumption that there was to be a stirpital division there also. It is true that there might have been in one event an intestacy, but on the other hand a contrary construction would lead to still greater difficulty, as has been pointed out in the course of the argument. In my opinion the order appealed from was right.

Solicitors: *Briggs, Vaughan, & Briggs*; *Moodie & Mills*; *Prior, Church, & Adams.*

M. W.

In re VICAT (A PERSON OF UNSOUND MIND).

C. A. 1886 June 7, 28

Trustee Act, 1850, *ss.* 3, 5, 20, 34 [*Revised Ed. Statutes, vol. x., pp.* 983, 986, 990]—*Vesting Order—Reappointment by Court of Existing Trustees—Severance of Joint Tenancy.*

Where there is no doubt that existing trustees of an instrument have been duly constituted, the Court will not reappoint them, with a view to making, under the *Trustee Act*, 1850, sect. 34, a vesting order which will not sever the joint tenancy.

In re Pearson (1) not followed.

A., *B.*, and *C.* were named trustees in a will, *A.* died, *B.* became of unsound mind, and *C.* appointed *E.* and *F.* trustees in the place of *A.* and *B.* Part of the trust estate consisted of a mortgage of freeholds. The appointment of *E.* and *F.* being unquestionably valid, the Court refused to reappoint them and make an order vesting the mortgage estate in *C.*, *E.*, and *F.*, but made an order appointing *C.* in the place of *B.* to convey the mortgaged property for the estate of himself and *B.* to himself, *E.*, and *F.* upon the trusts of the will.

JAMES VICAT, by his will, devised and bequeathed his real and personal estate to *A. Nelson*, *W. Robinson*, and *Anthony Vicat*, upon trusts. The will contained a provision that if all or any or either of his trustees, or any trustee or trustees to be appointed under the provisions should die or desire to be discharged or neglect or refuse or become incapable to act in the trusts, it should be lawful for the continuing trustee or trustees to appoint any other fit person or persons to supply the place of the trustee or trustees respectively so dying or becoming incapable to act as aforesaid. The testator died in 1871. *Nelson* had died in his lifetime, the other two trustees accepted the trusts. On the 20th of September, 1884, *Anthony Vicat* became of unsound mind, though not found a lunatic by inquisition. The trust property then consisted of freeholds, of mortgages on freeholds and leaseholds, and of stocks and shares in railway and other companies. The mortgages were of two classes. (1.) Mortgages vested in *Robinson* and *Anthony Vicat*; (2.) Mortgages vested in *Robinson*, *Anthony Vicat*, and *C. A. N. Vicat.*

By indenture, dated the 18th of December, 1885, *Robinson*, in

(1) 5 Ch. D. 982.

C. A. 1886 *In re* VICAT (A PERSON OF UNSOUND MIND).

exercise of the power in the will, appointed *R. N. Vicat* and *C. A. N. Vicat* to be trustees of the will in the place of *Nelson* and *Anthony Vicat*, and declared that the estate of *Robinson* and *Anthony Vicat* in the freeholds held on the trusts of the will should vest in *Robinson* and the new trustees.

Robinson, the new trustees, and the beneficiaries now presented a petition in Lunacy and in the Chancery Division asking that *R. N. Vicat* and *C. A. N. Vicat* might be reappointed trustees of the will in substitution for *Nelson* and *Anthony Vicat*, and in addition to *Robinson*, that the properties comprised in the mortgages might vest in the three trustees, subject to the equity of redemption existing therein, that the right to sue for the money secured by the mortgages might vest in the three trustees, and that the right to transfer the stocks and shares and to receive any dividends due thereon might also vest in the three trustees.

June 7. *Millar*, Q.C., and *J. E. Horne*, for the Petitioner:—

A vesting order is necessary, as the power given by the *Conveyancing and Law of Property Act*, 1881, of vesting the legal estate by the declaration of the appointor does not apply to mortgages or to stocks or shares. The stocks, shares, and mortgage debts can be dealt with under the *Trustee Act*, 1850, sect. 5, but an order vesting the legal estate in the mortgaged estates in the three so as not to sever the joint tenancy can only be made on an appointment of new trustees, and *In re Pearson* (1) is a clear authority for an order of the nature now asked (2).

COTTON, L.J.:—

I cannot follow *In re Pearson*. The order seems to me to have been made *per incuriam*. Where there is any reasonable question whether trustees appointed under a power have been duly appointed it may be quite right for the Court in a proper case to reappoint them. But when they have unquestionably been duly appointed, the reappointment of them by the Court is a nullity, and it is in my opinion wrong for the Court to profess to appoint them trustees for the purpose of making a vesting order in a form in which it can only be made upon an appointment of new

(1) 5 Ch. D. 982. (2) See also *In re Dalgleish's Settlement*, 4 Ch. D 143.

trustees. We cannot make the order proposed, but the desired end may be obtained by appointing a person to convey in the place of the lunatic. The petition may stand over with liberty to amend by asking for the proper form of order.

LINDLEY and LOPES, L.JJ., concurred.

The petition was amended, and as amended prayed as follows, so far as related to the mortgages:—(1) that *Robinson* might be appointed in the place of *Anthony Vicat* to convey and assign the hereditaments comprised in the first class of mortgages for the estate of himself and of *Anthony Vicat* to himself and the two new trustees upon the trusts of the will; (2) that *Robinson* and *C. A. N. Vicat* might be appointed in place of *Anthony Vicat* to convey the hereditaments comprised in the second class of mortgages for the estate of themselves and of *Anthony Vicat* to themselves and *R. N. Vicat* upon the trusts of the will; or (3) that *Robinson* might be appointed in the place of *Anthony Vicat* to convey the hereditaments comprised in the second class of mortgages for the estate of himself and *Anthony Vicat* to himself and *R. N. Vicat* and *C. A. N. Vicat* upon the trusts of the will; and (4) that the right to sue for and recover the mortgage debts might vest in *Robinson*, *R. N. Vicat*, and *C. A. N. Vicat*.

June 28. *Millar*, Q.C., and *J. E. Horne*, now mentioned the petition again, and an order was made according to paragraphs 1, 2, and 4 of the prayer.

Solicitors: *W. Robinson & Son.*

H. C. J.

C. A.
1886
July 6.

WRIGHT *v.* ROBOTHAM.

[1885 W. 928.]

Title Deeds, Custody of—Deeds relating to two Estates—Claim by Owner of one—Custody of Solicitors of previous Owner of both Estates.

The owner in fee of an estate gave her title deeds into the possession of her solicitors. She afterwards settled the estate, and under the limitations of the settlement part of the estate became vested, after her death, in the Plaintiffs, and the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solicitors refused to deliver up the deeds to the Plaintiffs:—

Held, that the Plaintiffs could not recover possession of the deeds from the solicitors without the concurrence of the heir; but that the deeds must be deposited in Court, the Plaintiffs having liberty to inspect and make copies of them.

By the settlement made on the marriage of *Sophia Boden* and *Charles Ordish*, dated the 17th of May, 1847, *Sophia Boden* conveyed four freehold houses in *Ashbourne Road, Derby*, and three freehold houses in *Fowler Street, Derby*, to three trustees, to the use of the trustees, their executors and administrators, during the life of *Sophia Boden*, in trust to pay the income to her for her separate use, with remainder to the use of *Charles Ordish* during his life, with remainder to the use of the children of the marriage as therein mentioned, with remainder, as to the four houses in *Ashbourne Road*, to the use of the survivor of *Charles Ordish* and *Sophia Boden* in fee, and as to the three houses in *Fowler Street*, to such uses as *Sophia Boden* should appoint by deed or will, and in default of and subject to such appointment to the use of the heirs and assigns of *Sophia Boden* for ever.

There was no issue of the marriage. *Sophia Ordish*, formerly *Boden*, survived her husband, and died in 1883. In 1881 *Sophia Ordish* by deed appointed the three houses in *Fowler Street* to *A. R. Rowbotham* in fee, by way of mortgage, which mortgage was transferred in 1884 to the Plaintiff *A. J. Flint*.

Sophia Ordish by her will, made on the 4th of March, 1882, appointed and devised the three houses in *Fowler Street* to the Plaintiff *George Wright* upon certain trusts.

The four houses in *Ashbourne Road* descended to the heir-at-law of *Sophia Ordish*.

The title deeds of the piece of land on which the houses in *Ashbourne Road* and *Fowler Street* were built, and the settlement of 1847, were given by Mrs. *Ordish* before the marriage into the possession of her solicitors, Messrs. *Robotham & Atwood*, who afterwards held them as the solicitors for the trustees of the settlement, and they were now in the possession of their successors, the defendants in the present action.

The trustees of the settlement were all dead.

The Plaintiffs being desirous of selling the *Fowler Street* houses, applied to the Defendants for the title deeds of the property. The Defendants declined to give them up to the Plaintiffs because they related to the houses in *Ashbourne Road*, which belonged to the heir-at-law of *Sophia Ordish*, as well as to the Plaintiffs' houses.

It was not known who the heir-at-law of *Sophia Ordish* was. The Defendants did not claim any lien for costs on the deeds. Under these circumstances, the Plaintiffs brought an action against the Defendants in the Chancery Division claiming the delivery up to them of the title deeds, and an injunction to restrain the Defendants from parting with them.

Mr. Justice *Kay*, by whom the action was tried, refused to grant the relief prayed, and ordered the deeds to be deposited in Court with liberty to the Plaintiffs to inspect them and take copies: and also ordered an inquiry who was the heir-at-law of *Sophia Ordish*, with liberty to apply as to the costs of the action.

From this judgment the Plaintiffs appealed.

W. Pearson, Q.C., and *Colt*, for the Appellants:—

This is really an action of detinue, and the Court must give the deeds to the party who has the best title. When two parties have an equal right to deeds, as in the case of tenants in common or owners of different parts of the estate, whoever has the deeds has a right to keep them: *Lord Buckhurst's Case* (1); *Davies* v. *Vernon* (2); *Foster* v. *Crabb* (3). For the same reason, either of

(1) 1 Rep. 1a.
(2) 6 Q. B. 443.
(3) 12 C. B. 136.

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the persons so entitled can recover them from a person who has no title to them. The Defendants are now mere strangers, they are not stakeholders, and they have no authority to hold the deeds from anyone who is interested in the estates. The Judge ordered the deeds to be brought into Court on the authority of *Ex parte Rogers* (1). We do not object to that, if the Court will not deliver them to us; but we object to the inquiry which the Judge ordered as to the next of kin; this he had no power to make in this action.

Hastings, Q.C., and *Geare*, for the Respondents, were not called on.

COTTON, L.J.:—

This is an action which has been brought under very peculiar circumstances. The Defendants, as solicitors, hold certain title deeds which relate to two estates. The estates were subject to a settlement made on the marriage of the owner, Mrs. *Ordish*, and the title deeds were given to the firm of solicitors who acted for the trustees, and the firm coming to an end, the Defendants, who were their successors, found the deeds in the possession of the firm and continued to hold them. In this there was nothing wrongful, they were in the lawful possession of the Defendants. Then, the owner of one of the estates to which the deeds relate, being the heir-at-law of Mrs. *Ordish*, not having been discovered, the owners of the other estate come to the Defendants and ask for the deeds to be given up to them; and the deeds not being handed over to them, although it appears that the Defendants offered to give the Plaintiffs copies of them and to produce them when required, this action is brought. At the hearing the Judge refused to make an order for delivery of the deeds to the Plaintiffs, but ordered the deeds to be deposited in Court, and also directed an inquiry as to the heir-at-law of Mrs. *Ordish*. From this judgment an appeal has been brought.

It is true that when deeds relate to two or more portions of an estate or to an estate which is held by tenants in common, if any one of the interested parties gets possession of the deeds none of

(1) 26 Ch. D. 31.

the other parties can get them from him; for no one can shew a better title to have them than he has. This is shewn clearly by the case which has been cited of *Foster* v. *Crabb* (1). But it is not so here. If the Defendants had the deeds in their possession the heir-at-law could not have recovered them, because he would have had no better right than the Plaintiffs. But it is a different question whether the owner of one of two estates to which the title deeds relate can maintain an action against the holder of the deeds in the absence of the owner of the other estate. In my opinion he cannot maintain such an action. The counsel for the Appellants put the claim of the Plaintiffs as a legal right, but they have no sole right. The heir-at-law has an equal right to the deeds. If he were to get possession of them the Plaintiffs could not take them from him. One of two persons who have equal rights to a chattel cannot bring an action at law in detinue against the holder without the other. Ought a Court of Equity to make an order at the suit of one only of two persons who have an equal interest in them? There is some difficulty in the question; but I think that the Plaintiffs ought only to get such an order as enables them to have the use of the deeds, not involving the handing of them over to their sole possession.

The deeds were given to solicitors to hold for the trustees; when the estate of the trustees came to an end they were to hold for such persons as might be entitled under the settlement. Only some of such persons have appeared to claim them. It would not be equitable to hand them over to them in the absence of the others. But I think the Judge was not right in directing an inquiry as to the heir-at-law. It might cause a great expense and the Plaintiffs do not desire it. That direction therefore must be struck out.

As the deeds cannot be handed over to the Plaintiffs I think they ought to be deposited in Court for the benefit of the Plaintiffs and the other persons who may be entitled to them and who will have access to them and may take copies of them. The appeal substantially fails, and I think that the Plaintiffs ought to bear the costs of the action. We will hear argument as to the costs of the appeal.

(1) 12 C. B. 136.

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LINDLEY, L.J.:—

The Plaintiffs appear to me to take an erroneous view of their rights—they are acting on a wrong principle. They think that they are entitled to the title deeds, and claim to have them delivered to them. The deeds relate to two properties, one of them consisting of four houses in *Ashbourne Road*, and the legal estate in them vested on the death of the tenant for life in the heir-at-law of the original settlor, and it is not known who that heir is. The legal estate in the other property, which consists of houses in *Fowler Street*, vested in the Plaintiffs upon the termination of the life estates. The title deeds were found in the hands of the solicitors for the trustees, whose estate has now determined. The possession of the deeds by the solicitors has never been an unlawful possession; they are in their lawful custody, and they properly retain them till the persons entitled to them are ascertained? Who are the persons entitled? They are the Plaintiffs and the heir-at-law of the settlor; he is not before the Court and is not ascertained. Then the Plaintiffs say they are entitled to have possession of the deeds, and they rest their claim on *Foster* v. *Crabb* (1); but that case only shews that if the Plaintiffs got the deeds they could hold them. The question is reduced to this, where two persons are entitled to title deeds can one recover without the other? I am of opinion that Mr. Justice *Kay* was right in holding that he cannot? The learned Judge ordered that the deeds should be brought into Court. I think that part of the decree was right. He also directed an inquiry to ascertain the heir-at-law. I think he was not right in doing that. There was no proof that this would be for the benefit of the Plaintiffs. That direction therefore must be struck out.

LOPES, L.J.:—

I am of the same opinion. The deeds relate to two properties. The Plaintiffs have the legal estate in one: the Defendants claim no interest in the other, but say that the heir-at-law of the settlor is entitled to it, and he is not ascertained. Then the Plaintiffs bring an action of detinue to recover the deeds. It is clear that they cannot maintain such an action. In order to succeed they

(1) 12 C. B. 136.

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are bound to make out that they were exclusively entitled to the possession of the deeds. So far from that they prove themselves that they and somebody else are entitled. Therefore, they cannot recover in the action. If it had been in the Queen's Bench Division they would have been non-suited on that ground.

Mr. Justice *Kay* ordered that the deeds should be deposited in Court. I think that was a very proper order: I think it was a mistake to direct an inquiry as to the heir-at-law. The Plaintiffs' appeal substantially fails.

After some further argument, the Court ordered the Plaintiffs to pay the costs of the action and of the appeal. All parties were to have liberty to apply as they might be advised.

Solicitor for Plaintiffs: *T. Tucker*, agent for *A. J. Flint, Derby.*
Solicitors for Defendants: *Geare, Son, & Pease.*

M. W.

POOLEY'S TRUSTEE *v.* WHETHAM.

C. A. 1886 PEARSON, J. *Feb.* 22, 23. C. A. *July* 12, 13.

[1884 P. 1602.]

Solicitor and Client—Mortgage by Client to Solicitor—Unusual Provisions—Power of Sale on Default without Notice—Duty of Solicitor to explain Provisions.

In April, 1879, *P.* owed £450 to his solicitor, *K.*, who was pressing for payment. On the 11th of April, 1879, he gave *K.* his promissory note for £466 17*s.* 10*d.*, payable three months after date, and on the 31st of May signed an agreement to mortgage to *K.* his interest in a railway for the £466 17*s.* 10*d.* The agreement contained a provision that, if that sum was not paid on the 11th of July, *K.* should be at liberty to sell the property without notice. The agreement was drawn by *K.*, and *P.* had no independent advice. Default having been made, *K.* sold without giving such notice as is required in the common form of power of sale:—

Held, by *Pearson*, J., and by the Court of Appeal, that, as this was not an ordinary mortgage transaction, but an arrangement for giving the client time for payment of a debt presently payable, the doctrine of *Cockburn* v. *Edwards* (1) did not apply; that it was not incumbent on *K.* to explain to *P.* the unusual form of the power of sale; and that the sale could not be impeached on the ground that it was not authorized by the common form of power.

THIS action was brought by the trustee in the bankruptcy of *Alexander Gopsell Pooley*, for the purpose (*inter alia*) of obtaining

(1) 18 Ch. D. 449.

C. A. 1886 POOLEY'S TRUSTEE v. WHETHAM.

a declaration that a sale of the interest of the bankrupt in the *Jersey Railway*, made on the 18th of October, 1879, by *George Edward Kaye*, one of the Defendants, to *Frederick Nalder*, another of the Defendants, was fraudulent and void as against the Plaintiff; and an order to set aside the sale.

Nalder was the secretary of the *Metropolitan Bank*, and he made the purchase on their behalf. The *Metropolitan Bank* afterwards went into voluntary liquidation, and their business and assets were transferred to the *Royal Exchange Bank*.

The Defendants to the action were Sir *Charles Whetham* (formerly the chairman of the *Metropolitan Bank*); the *Metropolitan Bank; Nalder;* the *Royal Exchange Bank*; *William Lyster Holt*, who had been formerly the trustee in *Pooley's* bankruptcy; and *Kaye*. Sir *Charles Whetham* died before the action came on for trial, and the action had not been revived against his representative.

In the year 1879 *Pooley* was possessed of or entitled to an interest in the *Jersey Railway*, an unprosperous concern which had become bankrupt, and had been sold to a nominee of the *Metropolitan Bank*, subject to its debenture debts, which amounted to £12,000. *Pooley* had an interest in this railway under an agreement with the *Metropolitan Bank*, which was then the subject of litigation between him and the *Metropolitan Bank* in an action of *Pooley* v. *Whetham and Others* [1879 P. No. 1].

In that action *Kaye*, who then carried on business as *G. E. Kaye & Co.*, was *Pooley's* solicitor. *Kaye* had made *Pooley* advances to the extent of £450, to enable him to purchase a locomotive engine for the railway, which *Pooley* was then working. *Kaye* had been pressing *Pooley* for repayment of the loan, and on the 11th of April, 1879, *Pooley* signed and gave to *Kaye* a promissory note for £466 17*s.* 10*d.* in favour of *Kaye*, payable three months after date.

On the 31st of May, 1879, an agreement was entered into between *Pooley* and *Kaye*, which contained the following provisions:—

"(1.) The said *A. G. Pooley* admits that he is indebted to the said *G. E. Kaye* in the sum of £450, upon an account this day settled and adjusted between them.

"(2.) In consideration of the said *G. E. Kaye* forbearing to enforce immediate payment of the said sum of £450, the said *A. G. Pooley* agrees to pay the said sum of £450, and £16 17*s.* 10*d.* for agreed interest, to the said *G. E. Kaye* on the 11th of July, 1879.

"(3.) The said *A. G. Pooley* hereby deposits the various documents mentioned in the schedule hereunder written, and charges such documents, and all his interest in the *Jersey Railway*, and also the steam engine called the *General Don*, now in work on the said *Jersey Railway*, as a security in favour of the said *G. E. Kaye* for payment of the said sum of £466 17*s.* 10*d.*, and agrees that he will, whenever thereunto required, at the expense of the said *A. G. Pooley* execute to the said *G. E. Kaye* a formal mortgage of the said several properties. The security is to be considered as collateral to a promissory note for £466 17*s.* 10*d.*, dated the 11th of April, 1879, made by the said *A. G. Pooley* in favour of the said *G. E. Kaye*, payable three months after date.

"(4.) Any such mortgage as is hereinbefore mentioned shall contain such powers of sale as the said *G. E. Kaye*, or his counsel, or any expert in the law of *Jersey*, shall think reasonable or proper, having regard to the nature of the property charged, and the decision of such counsel or expert shall be final and conclusive.

"(5.) In default of the said sum of £466 17*s.* 10*d.*, which will become due on the 11th of July, 1879, being paid on that day, or within fourteen days afterwards, the said *G. E. Kaye's* power of sale, as such mortgagee as aforesaid, shall be exercisable immediately thereafter, and without notice. In the meantime the said *G. E. Kaye* shall be considered to be entitled in equity, as from the date of the agreement, to the same powers, rights, and remedies in respect of the said sum of £466 17*s.* 10*d.*, as if the mortgage hereby agreed to be executed to him had been duly executed immediately after the execution of this agreement.

"(6.) The said *A. G. Pooley* hereby declares that his interest in the said *Jersey Railway* (charged by this agreement) is subject to no other mortgage, charge, or incumbrance, except the bonds now in existence on the said railway."

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The schedule to this agreement contained the following items:—

"(1) All interest and benefit of the said *A. G. Pooley* in the said *Jersey Railway* under an agreement called 'Heads of Agreement' (no date, but signed on or about the 18th of February, 1878), between *Frederick Nalder* of the one part, and the said *A. G. Pooley* of the other part."

(2.)—(8.) The document called "Heads of Agreement," and other specified documents.

"(9.) All interest and benefit of the said *A. G. Pooley* in the said *Jersey Railway* under an agreement called 'Terms of Arrangement' (no date, but signed on or about the 17th of August, 1878), between the said *A. G. Pooley* and *G. G. Newman*, for Mr. *Nalder* and the *Metropolitan Bank, Limited*."

(10.)—(18.) The said document called "Terms of Arrangement," and other specified documents.

"(19.) The locomotive engine called '*General Don*,' now running on the said *Jersey Railway*."

No formal mortgage was ever executed.

The £466 17*s.* 10*d.* was not paid by *Pooley* on the 11th of July, 1879, or within fourteen days after, and *Kaye & Co.* then wrote several letters to *Pooley* pressing him for payment.

On the 2nd of August, 1879, *Kaye & Co.* wrote the two following letters to *Pooley*.

(1.)

"Dear Sir,—

"*Yourself* v. *Whetham*.

"We have this day set down this action for trial for the sittings which commence in November next. As you appear by your letter of the 30th ult. to desire us to continue to act for you as your solicitors, we are willing to do so if you remit us forthwith £300 on account of our costs.

"This sum is the least we can take on account of costs, owing to the heavy matter we have had in hand for you. We shall expect your reply by Tuesday or Wednesday next, and, unless you pay us the sum we have named, we must decline to represent you any further, as we cannot afford to risk any further costs on your behalf."

(2.)

"Dear Sir,—Your letter of the 30th ult. received. We now require formally payment of your acceptance due on the 14th ult. for £466 10*s.*, with interest at 5 per. cent. per annum from that date.

"Unless we receive such amount by Wednesday next (the 6th of August) at 12 o'clock, we shall, without further notice, proceed to realise our security, and take such other steps as we may deem advisable."

On the 8th of August, 1879, *Kaye & Co.* wrote the following letter to *Pooley*:—

"Dear Sir,—

"*Yourself* v. *Whetham.*

"Referring to our letter of the 2nd of August, you must please understand that, as you have not complied with the terms therein demanded, we have, from this day, ceased to act as your solicitors in any of the various actions you have placed in our hands.

"If you wish it, and write us or instruct us to such effect, we will attend the completion of the order made by the Master of the Rolls on Wednesday last, and will also file your affidavit of documents in the action of the *Metropolitan Bank* and yourself.

"We shall also be happy to give our successor any help or assistance in our power."

On the 18th of October, 1879, *Kaye* sold the property comprised in his mortgage to *Nalder* by private contract for £700, and executed an assignment to him accordingly. *Nalder* made the purchase on behalf of the *Royal Exchange Bank*, who had meanwhile acquired the business and assets of the *Metropolitan Bank*. On the 22nd of October, 1879, *Pooley* was adjudicated a bankrupt.

By his statement of claim in this action the Plaintiff alleged that the mortgage of the 31st of May, 1879, contained no proper power of sale, and that *Kaye* did not explain to *Pooley* at or before the execution of the agreement what was the nature of the power of sale intended to be given. The Plaintiff also alleged that the sale to *Nalder* was greatly and fraudulently at an undervalue, to the knowledge of all the Defendants other

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than *Holt*. The Plaintiff also alleged that *Kaye*, to the knowledge and with the privity of all the Defendants other than *Holt*, exercised his rights improperly as between solicitor and client.

These allegations were all denied by the Defendants.

The Defendant *Kaye*, by his statement of defence, said that the terms of the agreement of the 31st of May, 1879, were fully understood and accepted by *Pooley*, and the stipulation that the power of sale should be exercisable without notice after fourteen days' default in payment of the amount of the promissory note was discussed and agreed to as an especial term of the agreement.

This was the trial of the action. Evidence was adduced to shew the value of the property, but there was no evidence that *Pooley* himself had ever complained of the sale.

The action came on for trial before Mr. Justice *Pearson* on the 22nd of February, 1886.

Cookson, Q.C., and *Sidney Woolf*, for the Plaintiff:—

It was the duty of *Kaye*, as *Pooley's* solicitor, to call his attention to and explain fully to him the unusual character of the power of sale conferred by the agreement of the 31st of May, 1879, and the *onus* lies on him to shew that he did so: *Cockburn* v. *Edwards* (1). The ordinary provision is, that at least three months' notice shall be given by the mortgagee to the mortgagor of his intention to exercise his power of sale. In the present case an immediate power of sale was given on the mortgagor's default in paying the debt at the time appointed. A solicitor cannot get rid of the relation between himself and his client at once by discharging himself: *Macleod* v. *Jones* (2). No sufficient notice was given to *Pooley* of the intended sale, and the evidence shews that the sale was made at a gross undervalue. The Plaintiff is, therefore, entitled to have it set aside.

The power of sale was not exercised honestly: *Robertson* v. *Norris* (3); *Warner* v. *Jacob* (4); *Martinson* v. *Clowes* (5).

The agreement itself, properly construed, did not authorize

(1) 18 Ch. D. 449.
(2) 24 Ch. D. 289.
(3) 1 Giff. 421, 424.
(4) 20 Ch. D. 220.
(5) 21 Ch. D. 857.

the making of the sale at the time when it was made. The 4th clause provided that the power of sale to be inserted in the formal mortgage was to be one which counsel should think reasonable and proper, and such a power would not have authorized the mortgagee to sell without notice.

Napier Higgins, Q.C., and *Northmore Lawrence*, for the *Metropolitan Bank* and *Nalder*;

Sir *H. Davey*, S.G., *Cozens-Hardy*, Q.C., and *Grosvenor Woods*, for the *Royal Exchange Bank*;

Giffard, Q.C., and *Swinfen Eady*, for *Holt*; and

Waddy, Q.C., and *Dauney*, for *Kaye*, were not heard.

PEARSON, J.:—

The action seeks, in the first place, to set aside a sale made by Mr. *Kaye*, under and by virtue of an agreement dated the 31st of May, 1879, and made between his then client, Mr. *Pooley*, of the one part, and himself of the other part, of *Pooley's* interest in the *Jersey Railway*. The grounds upon which the sale is sought to be impeached are, first, that the agreement did not give Mr. *Kaye* the power of selling at the time when, and in the manner in which, he did sell; secondly, that, if it did, the power to sell was improperly inserted in the agreement, and was not binding on *Pooley*, and is not therefore binding on the Plaintiff; and, thirdly, that the railway was sold at a gross undervalue, and that, therefore, there was what this Court considers fraud in the sale. Assuming the Plaintiff to succeed on this part of his case, the action then seeks to set aside a compromise which was made in a suit of *Pooley* v. *Whetham*. The Plaintiff's counsel have very fairly admitted that, if the judgment of the Court is against them upon the sale, the action must fail, because they would not then have any *locus standi* on the second part of it. I have heard the Plaintiff's case on the first point, and I propose to give judgment on that point at once, because it will relieve the Court from hearing the rest of the case.

In the year 1879, Mr. *Kaye* first became solicitor to Mr. *Pooley*,

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Pearson, J.

and in that year, partly in consequence of Mr. *Kaye* acting as Mr. *Pooley's* solicitor in the suit of *Pooley* v. *Whetham*, to which I have already referred, Mr. *Pooley* became indebted to Mr. *Kaye* in the sum of £450. Mr. *Kaye* had not the greatest confidence in Mr. *Pooley* as a paymaster, and in the month of May, 1879, he pressed him for payment, and on the 31st of May, 1879, the agreement in question was come to.

[His Lordship read the agreement, and the two letters of the 2nd of August, 1879 above stated, and continued :—] The money not being paid, Mr. *Kaye* looked about for a purchaser, and eventually sold the property to Mr. *Nalder* for £700.

The first objection raised is, that this was a mortgage to a solicitor taken from his own client, and that, therefore, a mortgage which was in such unusual terms ought to have been most carefully explained by the solicitor to the client, in order that he might be aware what he was doing when he entered into it; and it is said that the burden lies on Mr. *Kaye* to shew that he did explain it, and point out to Mr. *Pooley* that the form of agreement was unusual, and rendered it possible that the power of sale might be exercised in a shorter time than is usual in mortgages. I do not desire to say one word which might indicate that I appreciate less than other Judges the safeguards and protection which this Court throws over clients who are dealing with their solicitors, or that I think a solicitor, in dealing with his client, is not bound to be more careful than he is in dealing with any other person. Nevertheless, justice ought to be dealt out to a man, whether he is a solicitor or a layman. The first question I have to consider, therefore, is, whether this agreement comes within the class of agreements which have been considered by the Court as not proper in the case of a solicitor and his client, unless distinct notice is given by the solicitor to the client at the time what it is that he is doing. Now this case has been treated in argument as if it were the case of an ordinary mortgage given to secure the repayment of a loan of money. To my mind that is not the meaning of this instrument, and I think there is no rule more binding upon the Court than this, that every document must be construed according to the intention of the parties. Let us see what the intention of the parties must have been, and what, upon

the face of the agreement, their intention was, on the day on which it was executed. Mr. *Pooley* owed his solicitor £450 and he was pressing for payment. There is a recital in the agreement that the account between them has been adjusted and settled. There was, therefore, not the slightest reason why Mr. *Kaye* should not issue a writ on that account, and obtain judgment at once under Order XIV. Mr. *Pooley* therefore, was in immediate peril of having payment of this £450 enforced against him *brevi manu*. He asks for time. Mr. *Kaye* agrees to give him three months' time and no more. It is plain that the bargain between them was that he should have three months', and only three months', delay before the payment of the £450 was to be enforced. The whole document shews this, and the fifth clause states it expressly. I think it is impossible to read the agreement without seeing that it was the intention of the parties that, if the money was not paid at the end of the three months, the power of sale should, as is stated in the sixth clause, be exercisable immediately. The agreement was not intended to secure a loan. It was simply an agreement giving Mr. *Pooley* protection for three months, giving him that time to find the money to pay off Mr. *Kaye*, and at the same time securing Mr. *Kaye* by giving him the opportunity of selling the property if the money was not paid at the end of the three months. But it was said, if that be so, what was the meaning of the fourth clause of the agreement? By the third clause, Mr. *Pooley* deposits certain documents, and gives Mr. *Kaye* a charge on them, and on his interest in the railway and rolling stock, and undertakes at his own expense to execute when required a formal mortgage; and the fourth clause merely says this, that, inasmuch as the property is in *Jersey*, and the mortgage must be one which can be enforced according to the laws of *Jersey*, a power of sale in conformity with those laws shall be inserted in it, and the opinion of counsel is to be conclusive what that power ought to be. This seems to me to make the clauses perfectly consistent with each other. The fifth clause prescribes the time at which the power of sale shall be exercisable, and the fourth provides that the mortgage, when executed, shall contain such a power of sale as according to the law of *Jersey* would be proper to be inserted in it.

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It was said that Mr. *Kaye* sold without notice to Mr. *Pooley*, but that is not so. The fourteen days after the 11th of July expired on the 25th of July, and on the 2nd of August there was as plain a notice as could be that Mr. *Kaye* was going to sell. The sale did not in fact take place till the 18th of October. It is remarkable that, if there was any objection to Mr. *Kaye* selling under his power of sale at the time that he did, Mr. *Pooley*, who knew what was being done, never made a single remonstrance at the time, charging Mr. *Kaye* with doing that which was harsh or unjust, or which he had no power to do. I cannot find that Mr. *Pooley* made any objection at all to that which he must have known was being done with the railway.

The next objection is, that the property was sold at a gross undervalue. I need not say that the undervalue ought to be such as to be of itself an *indicium* of fraud. [His Lordship referred to the Plaintiff's evidence on this point, and continued :—] I am not at all satisfied from the evidence that that £700 was an inadequate price, or, indeed, that it was not more than the property was worth at that time.

There does not seem to me to have been any fraud or collusion or impropriety in the proceedings from beginning to end. I think the agreement authorized the sale. I think the sale was made for a fair and proper sum at the time; and, under these circumstances, I must decline to give any relief in respect of the sale. This disposes of the other part of the case as well, and, therefore, all I can do is to dismiss the action, with costs.

Napier Higgins, Q.C. :—The costs will be payable by Mr. *Buttifant*, the trustee, personally.

PEARSON, J. :—I understand that to be a matter of course.

Napier Higgins, Q.C. :—The costs will be on the higher scale?

PEARSON, J. :—Yes.

W. L. C.

C. A. The Plaintiff appealed. The appeal came on for hearing on the 12th of July, 1886.

Cookson, Q.C., and *Sidney Woolf*, for the appeal :—

We contend that the power of sale was improper, and that supposing it valid it was not properly exercised.

As to the first point we rely on *Cockburn* v. *Edwards* (1). It was the duty of *Kaye* to explain to *Pooley* that the power of sale was in an unusual form, and unless he can prove that he did so (which he has not attempted to do) his power of sale, containing none of the conditions found in the common form, cannot be supported. He was bound to tell *Pooley* that if this security was executed *Kaye* would be able immediately on default in payment to sell *Pooley's* interest and defeat the then pending litigation.

[LOPES, L.J. :—The clause is perfectly intelligible to any man of business.]

Yes, but an ordinary man of business would not know that it gave an unusual power.

But supposing the power valid we say it was not well exercised. If a mortgagee exercises his power of sale not for the purpose of getting his money, but to effect other purposes of his own, or to serve the purposes of other individuals, the sale cannot stand: *Robertson* v. *Norris* (2). Here the object of selling was to get rid of *Pooley*.

[LINDLEY, L.J. :—The bank no doubt bought with a view to that—but what interest had *Kaye* in doing so ?]

He avows in his letters that he was doing it to help the bank, and that without regard to the interests of his late client.

Napier Higgins, Q.C., and *Grosvenor Woods*, and *Waddy*, Q.C. and *Dauney*, for the Respondents were not called upon.

COTTON, L.J. :—

This is an appeal by the trustee in bankruptcy of the late Mr. *Pooley* from a judgment of the late Mr. Justice *Pearson* dismissing his action.

The object of the action was to set aside a sale to the bank by Mr. *Kaye* under a power contained in a document which gave him an equitable security. In April, 1879, Mr. *Pooley*, who was

(1) 18 Ch. D. 449, 456 (2) 1 Giff. 421; affirmed 4 Jur. (N.S.) 443.

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his client, was indebted to him in the sum of about £450, which was presently payable. On the 11th of April, 1879, a promissory note was given for £466 17*s.* 10*d.*, payable three months after date, being the amount of the £450, with an agreed sum for interest. At the time Mr. *Pooley* had no money, and he had no security to offer other than the security of such interest as he had in the *Jersey Railway*. Of course, when the note came due, there might have been instant action taken by Mr. *Kaye* against *Pooley*, and I suppose some means could have been taken for enforcing payment and getting execution against any interest he had in the railway. Therefore it is not the case of a solicitor lending money to a client, but it is the case of a solicitor having a claim against the client, the client not being able to pay, and the solicitor getting from him such security as he could so as to prevent it being necessary for him to enforce his legal rights as against the client. I quite adhere to the rule as laid down in *Cockburn* v. *Edwards* (1), that if a solicitor lends money to his client, he must take from him a security on that advance in the ordinary terms, unless he points out to his client how far the terms on which he is willing to lend the money differ from those which are usually required by persons lending money; and if the transaction is ever impeached by the client to whom he lends the money, he must, in order to support it, shew that he has given such advice to his client about the transaction as he would have given to a client borrowing money from a third party, or as any other solicitor not personally interested in the transaction would have given to the client. But this is a transaction entirely different from an ordinary loan of money, it is a transaction in which the question is, what terms can the client make with the solicitor? If there had been any real question whether Mr. *Pooley* understood the terms of this equitable security, the case would have been very different from that which we have to consider. Here, there being this note outstanding, which would become payable on the 11th of July, power is given to the solicitor who holds the note, and who could instantly have sued, to sell and realise the security which he held. There is also a great difference between this case and that of *Cockburn* v. *Edwards*

(1) 18 Ch. D. 449.

as regards the nature of the property. There the mortgage was on property as to which we know how it is usually dealt with. Here the property was of a very peculiar character. It was an interest in a railway burdened with a heavy debenture debt—the concern had previously become bankrupt, and, apparently, the interest of Mr. *Pooley*, if worth anything, was worth very little. Therefore, it might be very reasonable that this not being an ordinary transaction there should be such a power as is here given to Mr. *Kaye*, Mr. *Pooley* not suggesting, as, indeed, he hardly could have done, that he did not understand the power of sale, though he probably did not know what the ordinary power of sale in an ordinary mortgage is. Then it is also to be observed that in an ordinary mortgage the terms usually are that the power of sale shall not be exercised unless the principal is wholly or in part unpaid six months after notice, or unless interest is in arrear for three months. Now, at the time when this power of sale was exercised there really was three months' interest in arrear, because the £16 17*s.* 10*d.* was the interest on the debt due down to the 11th of July, and that had been in arrear for at least three months at the time this sale took place. In *Cockburn* v. *Edwards* (1) the Court inquired whether the interest was in arrear, and only held the solicitor liable for the exercise of the power of sale because on the evidence before them they came to the conclusion that in fact he had been paid all the interest which was due by receipt of rents which he had appropriated to payment of interest, so that the ordinary form of a power of sale would not have allowed the sale which in fact was made by him.

The power of sale given to Mr. *Kaye* being therefore not objectionable, is there any objection to the sale? A passage was read to us from the judgment of the late Vice-Chancellor *Stuart* in *Robertson* v. *Norris* (2), stating that the Court will consider the exercise of a power of sale improper, and will prevent it being effectual against the mortgagor if it is exercised, not for the purpose of getting the money which is due on the mortgage to secure which the power of sale is given, but for some indirect purpose—a statement of the law from which I do not dissent. It was said that here the power of sale was exercised by Mr. *Kaye*, not for the

(1) 18 Ch. D. 449. (2) 1 Giff. 421.

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purpose of getting his money, but for the purpose of giving an advantage to the bank in the action which was going on between *Pooley* and the bank. That, in my opinion, is not the fact. The bank undoubtedly purchased in order to get an advantage against *Pooley*, and I quite think if it had not been for that they would not have given for his interest the sum they did; for, as far as we can make out, *Pooley's* interest was not worth anything at all except to the bank, whose position as to the railway might make it worth their while to purchase this interest. That explains how it was that Mr. *Kaye* went to the bank, and why he urged them to take it. He was going to the persons who, as he thought, would be the only purchasers, and whom he thought likely to become purchasers, not because they believed there was any real value in the interest of Mr. *Pooley* in the railway to an independent person, but because they might get an indirect advantage in buying it. The railway had been bankrupt, and the interest on its debentures was not paid, and as far as we can see the interest of *Pooley* was worth nothing at all to a purchaser not in any way connected with the railway, but was worth something to a person engaged in a litigation with him as regards their interests in the railway. In my opinion, therefore, there is nothing here to shew that the sale was at an undervalue—nothing to shew that the mortgagee's object in the sale was anything but that which was perfectly legitimate, viz. to get his money from the only persons whom he could think likely to buy. In my opinion the decision of Mr. Justice *Pearson* was right, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. In the first place, with respect to the right of the present Appellant to impeach the sale made under *Kaye's* security, we must look at the position in which the parties were, and consider the subject-matter to which the security relates. Certainly this has no resemblance to an ordinary mortgage transaction, and it would in my opinion be a mistake to apply to the case the rules applicable to ordinary mortgage transactions. It is clear that Mr. *Pooley* was a man of business, and understood perfectly well the nature of the document he was

signing. The language, which relates to an immediate power of sale, is as plain as language can be, and Mr. *Pooley* never suggested, nor does anyone allege, that he did not see it and understand it. But what is urged on behalf of the Appellant is that Mr. *Kaye* did not explain to Mr. *Pooley* that this was a security in an unusual form; and that Mr. *Kaye* being Mr. *Pooley's* solicitor ought to have explained this to him. The answer to that is that the whole transaction was quite unusual, and there is no common form applicable to the case. That as I understand is the view which Mr. Justice *Pearson* took, and appears to me to be the answer to the argument based on *Cockburn* v. *Edwards* (1), which, in my opinion, has nothing to do with a case of this kind.

The next point is as to the sale. The Plaintiff says the sale was improper; but when we look at the nature of the property comprised in this security we find that it was an interest in a railway in *Jersey* saddled with a large debenture debt, and also, as we are told, with arrears of interest on the debentures, so that the actual value of the subject-matter of the security is very difficult to get at. From some of the letters which have been read in evidence it would not appear to be worth much; and, considering the history of the undertaking, I should doubt very much whether there were many persons likely to bid for such a property as this. It did so happen that the bank had reasons for becoming the purchasers; and Mr. *Kaye* went to them as the persons who were more likely than anybody else he knew of to give a good price for *Pooley's* interest, as it was to their advantage to get the railway into their own hands. He did not care who bought the interest he offered for sale. He wanted his money. The letters shew that; and Mr. *Kaye*, although he was not bound by the agreement to give any notice before selling, did in point of fact give *Pooley*, on the 2nd of August, 1879, very distinct notice of his intention to sell, and he waited till October, 1879, before selling. He appears to me, therefore, to have done all that an unpaid creditor with a security like this could be expected to do, and he sold to the only people who, as far as I can see, were likely to give anything for the interests to be sold. He managed to get from them £700 for it, when probably no

(1) 18 Ch. D. 449.

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one else would have given anything. To say that he was using this power for an indirect and improper purpose appears to me to be a suggestion at variance with the whole tenor of the evidence. I think that Mr. Justice *Pearson's* decision was right, and this appeal must be dismissed.

LOPES, L.J.:—

Very salutary safeguards, which I should be the last to undervalue, are placed around transactions between solicitors and their clients, and if this were an ordinary mortgage transaction doctrines would be applicable to it which, in my view, are not applicable to it as it stands.

In my opinion this is not an ordinary mortgage for a loan of money by a solicitor to his client, but it is an arrangement by *Kaye*, the solicitor, to give a specified time to *Pooley*, the client, to pay a sum which was already owing. *Kaye* was to be at liberty according to the terms of the arrangement to sell the property if the money was not paid at that specified time. Now it has been said that *Kaye* ought to have explained the nature of the provisions of the document to *Pooley*. It seems to me ludicrous to suggest that such an explanation was necessary when the circumstances of the case are considered, ludicrous to suggest that *Pooley* could fail to understand it perfectly. The position of things was this. At the time *Pooley* owed *Kaye* £450. *Kaye* had written letter after letter pressing for payment of the money. *Pooley* was unable to pay, and then, as a last resource, an arrangement was entered into, *Pooley* giving a promissory note and afterwards entering into this agreement, the clear intention of the whole thing being this, that the payment of that money was to be postponed in consideration of the document in question. I think, therefore, it was not a security for the loan of money, but rather, as I have said during the course of the case, the purchase of an indulgence.

Then it is said that the power which was contained in this equitable mortgage, as it is called, was not properly exercised. It is suggested that *Kaye* had some indirect object in view—that he wanted to crush *Pooley*. All I can say is that the evidence, according to my view, clearly points to this, that the

dominant idea in *Kaye's* mind throughout was to get his own money, and he did not care, as far as I can see, for anything else provided that was obtained. Then it was also said the property was sold at an undervalue. I think there is nothing in that. It seems to me *Kaye* acted most judiciously, that in point of fact he sought out and found the purchaser whose interest it was to purchase the property more than any one else, and who would be most likely to do it. I think this appeal ought to be dismissed, and I agree entirely with the judgment Mr. Justice *Pearson* pronounced.

Solicitors for Plaintiff: *Harper & Battcock.*

Solicitors for *Metropolitan Bank* and Defendant *Nalder*: *Stretton & Hilliard.*

Solicitors for *Royal Exchange Bank: Snell, Son, & Greenip.*

Solicitors for Defendant *Holt: Rundle & Hobrow.*

Solicitors for Defendant *Kaye: Kaye & Guedalla.*

H. C. J.

NEWBOULD *v.* SMITH.

[1884 N. 369.]

Statute of Limitations—Evidence—Entry against Interest—Payment of Interest—Agency.

N., a solicitor, lent money to *S.*, a client, on equitable mortgage, and on the 12th of February, 1866, an account was settled between them as to the amount due. After this there were no entries relating to *S.* in *N.'s* ledger. In July, 1878, *S.* assigned the mortgaged property to his two nephews, subject to all incumbrances. In a diary kept by *N.*, who had since died, was an entry dated the 10th of September, 1878, of the receipt of money from *S.* for interest. There was nothing else to shew payment of interest after 1866. In an action to enforce the security against the nephews, *North*, J. held that this entry was not admissible in evidence to take the case out of the *Statute of Limitations* :—

Held, on appeal, that assuming the entry to be admissible in evidence, as to which the Court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shewn to be agent of the assignees, and that this could not take the case out of the statute as against the assignees.

S. in 1863 mortgaged other property to *A.*, a client of *N.* *N.* paid

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interest on the mortgage and charged *S.* with it in account till 1866. After this *N.* went on paying interest to *A.*, who believed that it came from *S.*, but it was not shewn that *N.* had ever acted as solicitor to *S.* after 1866, nor was there anything shewing that *N.* was authorized to make the payments as agent for *S.*:—

Held (affirming the decision of *North*, J.), that the payments of interest after 1866 did not take the case out of the *Statute of Limitations*.

A letter from *N.* to *A.* stating that he had paid to *A.*'s account a sum received from *S.* for interest, held not to be an admission against interest so as to be admissible in evidence to shew payment by *S.*

IN 1863, *Newbould*, a solicitor, lent to *Charles E. Smith*, a client of his, £430 on an equitable mortgage of leasehold property in *Montague Street*. An account was settled between them in February, 1866, when the sum due on the mortgage was fixed at £350. Up to this time *Newbould* had kept accounts of receipts and payments on behalf of *Smith*, including payments of ground rent, but from that time there were no entries as to *C. E. Smith* in his ledger. On the 4th of July, 1878, *C. E. Smith* assigned the *Montague Street* property to *B. Smith* and *S. Smith*, subject to the mortgages and charges thereon. In *Newbould's* diary was among his receipts an entry under date the 10th of September, 1878: "*Smith, C. E.* Cash on account of rent and interest, £50." It was proved by the ground landlord that at that time *Smith* did not owe so much as £50 for ground rent.

By indenture dated the 16th of April, 1863, *C. E. Smith* mortgaged to the Misses *Alderson*, who were clients of *Newbould's*, some houses in *Franklin Street* for £600. Up to the 12th of February, 1866, *Newbould* paid interest to the Misses *Alderson*, and paid the ground rents, and brought interest and ground rents into his account with *C. E. Smith*. After that time he continued to pay the interest and ground rents, and one of the Misses *Alderson* gave evidence that they received interest from him in the belief that it was paid through him by the mortgagor. There was in evidence a letter dated the 22nd of December, 1868, from *Newbould* to the Misses *Alderson*, in which he stated that he had paid into their account at their bankers a sum received by him from *Smith* for interest. There was no further evidence to connect *C. E. Smith* with the payments, nor was it shewn that *Newbould* had ever acted as his solicitor after 1866.

Newbould died in 1880. The Plaintiff, who was his administratrix, took a transfer of the mortgage to the Misses *Alderson*, and brought her action against the three *Smiths* to enforce both securities. The Defendants pleaded the *Statute of Limitations*. Mr. Justice *North* held that the entry of the 10th of September, 1878 was not admissible in evidence, and that as regarded the *Alderson* mortgage there was no proof that the payments of interest were made by *Newbould* as *C. E. Smith's* agent. The action was therefore dismissed (1). The Plaintiff appealed.

Barber, Q.C., and *C. Gould*, for the Appellant:—

The entry of the 10th of September is admissible in evidence. The case is different from *Briggs* v. *Wilson* (2). In that case the entry was not *primâ facie* against the interest of the person making it, for on the face of it its effect would be to revive a debt barred by the statute. Here we submit that the debt was not barred at the time of the memorandum, for that under sects. 3, 24 and 40 of 3 & 4 Wm. 4, c. 27, the personal remedy continues as long as the remedy against the land: *Sutton* v. *Sutton* (3); *Fearnside* v. *Flint* (4); *In re Powers* (5). At all events the remedy against the land was not barred when this entry was made. If the entry is *primâ facie* against the interest of the person making it, it does not cease to be evidence because he may collaterally get a benefit from it: *Taylor* v. *Witham* (6); *Higham* v. *Ridgway* (7); *Smith* v. *Blakey* (8). There is, then, evidence of a payment by *C. E. Smith* on account of interest in 1878. It is said that such payment would have no effect, as *C. E. Smith* was not owner of the property when he made it, and *Harlock* v. *Ashberry* (9) is referred to as shewing that the payment must be by the person liable to pay, but *C. E. Smith* was the person liable to pay, for he was the borrower. As to the *Alderson* mortgage, it is a very dangerous doctrine to hold that when a mortgagee goes on receiving interest through a person who once acted as the mortgagor's agent, he loses his security because

(1) 29 Ch. D. 882.
(2) 5 D. M. & G. 12.
(3) 22 Ch. D. 511.
(4) Ibid. 579.
(5) 30 Ch. D. 291, 297.
(6) 3 Ch. D. 605.
(7) 10 East, 109.
(8) Law Rep. 2 Q. B. 326, 331.
(9) 19 Ch. D. 539.

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unknown to him that person has ceased to be agent. The letter of the 22nd of December, 1868, is evidence of payment of interest by *Smith*, being an entry against interest, as it admits the receipt of money to be accounted for to the Misses *Alderson*.

COTTON, L.J.:—

We all think that letter not admissible. You cannot separate one part of it from another. It is not a mere statement that he has received money from *Smith* on account of the Misses *Alderson*, but a statement that he has paid money to the account of the Misses *Alderson*, which money was received from *Smith*. That is not an admission against interest.

Warmington, Q.C., and *Anderson*, for the Defendants:—

[COTTON, L.J.:—Is not *Newbould's* being *Smith's* solicitor some evidence that the payments of interest to the Misses *Alderson* were made by him as *Smith's* agent?]

There is no evidence that *Newbould* ever acted as solicitor to *Smith* after 1866.

[They were then stopped by the Court].

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *North*, who dismissed the Plaintiff's action on the ground that the mortgage and the equitable charge which it seeks to enforce were barred by the *Statute of Limitations*. As regards the equitable charge for £430 which was granted to Mr. *Newbould*, it is argued that the statute was prevented from applying by an entry made in his books, which was urged to be admissible because it was contrary to his interest. The equitable mortgage had been granted to him by the Defendant *C. E. Smith* some time before 1866, and this entry is dated the 10th of September, 1878. It is not disputed that before that time *C. E. Smith* had transferred to the two other Defendants the property comprised in this equitable charge. I give no opinion upon the question whether this entry is admissible in evidence, but supposing that it is, what does it come to? That *Newbould* received from *C. E. Smith* some sum

on account of interest on the 10th of September, 1878. At this time *C. E. Smith* was not the owner of the equity of redemption. The entry may be sufficient to keep alive the claim as against *C. E. Smith*, but it is sought by means of it to keep up a claim against property which at that time belonged not to him but to somebody else. In my opinion even if in fact *C. E. Smith* in September, 1878, paid a sum in respect of interest on this mortgage, that would not be sufficient to prevent the statute running in favour of those to whom previously to this time he had transferred the property. It is said that he had assigned it subject to the mortgages and charges thereon. That is so, but that does not make him an agent to pay interest on behalf of those to whom he has transferred the property. It may be he might have a claim against them, but that is not the question which we are considering. The question is whether this payment is to be considered as their payment, that is to say, whether he is to be considered as their agent in making it. They say in their statement of defence that if this payment was made it was not made by their authority or with their knowledge. In my opinion, then, even if the entry is admissible, it does not prove anything that can help the Plaintiff.

Then we come to the mortgage made to the Misses *Alderson*, interest upon which seems to have been paid to them by *Newbould* from time to time until shortly before his death. Then the question is, has there been a payment which we can consider as made by the mortgagor or on his behalf? If Mr. *Newbould* had down to the time of his death been *C. E. Smith's* solicitor I should have said that there was some evidence, the effect of which we should have had to consider, of his having made these payments as agent and on behalf of *C. E. Smith*. It turns out, however, that the latest date down to which it is proved that he was solicitor for *C. E. Smith* is 1866. Now what we have to consider is whether the payments were made by him as agent at the time when he made them, and his having been *C. E. Smith's* solicitor a great many years before will not be evidence at all in favour of the view that at the time when he made these payments he was an agent authorized to make them on behalf of *C. E. Smith*. In my opinion this appeal fails.

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LINDLEY, L.J. :—

I am of the same opinion. As regards the first mortgage, which was a mere equitable mortgage, the debt was a simple contract debt, and so far as it was a simple contract debt it was barred before the entry of the 10th of September, 1878, was made; but although it was a simple contract debt it was secured upon land; and it has been contended that it was not barred so far as it was a charge on land when the entry was made, and that the entry was therefore in time to prevent the statute from running. But then this difficulty arises, viz., that when the entry of the 10th of September, 1878, was made *Smith* had parted with all his interest in the land, and there is no evidence whatever to shew that at the time when the entry was made he had paid that money, if he did pay it, as the agent of the then owners of the equity of redemption; and failing that proof it appears to me that the entry comes to nothing at all.

Now as regards the second mortgage we have really no evidence whatever of any agency of *Newbould* for *Smith*, there being no proof that *Newbould* was the solicitor of *Smith* after 1866. If that is the case, it is mere guesswork to say that *Newbould* made the payment of interest as the agent of *Smith*. There again the case breaks down entirely for want of proof. It appears to me therefore that the judgment is right and that the appeal ought to be dismissed.

LOPES, L.J. :—

The question is whether these two charges are barred by the *Statute of Limitations*. First with regard to what I will call the *Montague Street* charge, which was an equitable mortgage, that is barred unless the case is taken out of the statute by the entry of the 10th of September, 1878. It is unnecessary to express any opinion with regard to the admissibility of this entry as evidence, and I do not desire to do so. It is perfectly clear that on the 10th of September, 1878, *Smith* was not the owner of the equity of redemption, and therefore even if the entry is admissible it does not shew a payment by any one interested in the mortgaged property. I think therefore that the entry comes to nothing.

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With regard to the other, which I call the *Franklin Street* mortgage, payments of interest were made by *Newbould*, and it has been suggested that he must be considered to have made them as agent for *C. E. Smith*. No doubt he had been the solicitor for *C. E. Smith*, but there is no evidence whatever to shew that *Newbould*, at the time these payments were made, was *Smith's* solicitor, or an agent authorized to make those payments on *Smith's* behalf. I think that the decision of the learned Judge below was right.

Solicitors for Plaintiff: *Geare, Son & Pease*, for *Newbould & Gould, Sheffield.*

Solicitors for Defendants: *Munton & Morris*, for *Parker & Brailsford, Sheffield.*

H. C. J.

MICKLETHWAIT *v.* NEWLAY BRIDGE COMPANY.

C. A. 1886 *July* 21, 22.

[1886 M. 1715.]

Riparian Proprietor—Grant of Land adjoining River—Intention to pass half the Bed of the River.

Though the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which shew that the parties must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, shew it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river.

M. being entitled to lands on both sides of a river, sold and conveyed to *L.* a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7752. The deed contained various reservations for the benefit of *M.*, but contained nothing express to shew whether the half of the bed was intended to pass or not. *M.* was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from *L.'s* land. The Plaintiffs, who had

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succeeded to all *M.'s* property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to *L.* passed half the bed, no part of the new bridge would be over land of the Plaintiffs:—

Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass:

Held, also, that a stipulation in the grant that nothing therein contained should prejudice or affect *M.'s* right to take tolls over his bridge did not preclude *L.'s* taking away custom from that bridge by the erection of a new bridge.

The conveyance reserved to *M.*, his heirs, &c., the right of entering upon the land or any part thereof for the purpose of repairing *M.'s* bridge. *Held*, that this did not preclude *L.* from erecting any structures upon the land, provided he left reasonable access for the purpose of repairing the bridge.

BY indenture dated the 7th of March, 1854, made between *John Micklethwait* of the one part, *Joseph Lowden* of the second part, and *George Lucas* of the third part, reciting to the effect that, by an indenture dated the 4th of September, 1852, *Micklethwait* demised to *Lowden* all that piece or parcel of land or ground as the same was then staked out and divided from the adjoining lands of *Micklethwait*, situate at *Newlay*, in the parish of *Leeds*, containing by admeasurement 6194 square yards or thereabouts, and bounded by a new line of road leading from the *Leeds and Bradford Railway* to the iron bridge some time since erected by *John Pollard*, deceased, over the River *Aire*, called *New Laithes Bridge*, at *Newlay* aforesaid, on or towards the west, and by other land belonging to *Micklethwait* on or towards the east or north-east, and "by the River *Aire* on or towards the north," and by an intended road twenty-four feet in width, on or towards the south, And also all those dye-works, cottages, or dwelling-houses and buildings then standing on the said parcel of land, together with the appurtenances, for the term of twenty-one years, at the rent and subject to the covenants therein contained, and that it was by the same indenture of lease agreed that if *Lowden*, his executors, administrators, or assigns, during the continuance of the demise, should be desirous to purchase the demised premises, he or they should be entitled to do so at the price of £1359 15*s.*, And that if *Lowden*, his executors, administrators, or assigns, should be desirous of purchasing any quantity of the land adjoining the east or north-east boundary of the demised premises not

exceeding one acre in quantity, and to be severed from the estate of *Micklethwait* by a line running parallel to the whole of the said east or north-east boundary, and to be of equal breadth throughout, he or they should be entitled to purchase it at the rate of £800 per acre, And reciting that *Lowden*, being desirous in pursuance of the above power to purchase the demised premises, and also to purchase from *Micklethwait* additional land adjoining the south and east boundaries of the same hereditaments, *Micklethwait* had agreed with him for the absolute sale to him of the hereditaments thereinafter described (subject as thereinafter mentioned) for £1623 15*s.* 11*d.*, *Micklethwait*, in consideration of that sum, conveyed to *Lowden* and his heirs, "All that piece or parcel of land of an irregular shape being part and parcel of a certain close of land called the *Upper Brigg Flatt*, as the same part and parcel is now staked out and divided from the adjoining lands of the said *J. Micklethwait*, situate at *Newlay*, in the county of *York*, containing by admeasurement on the westerly side thereof 404 feet, on the easterly or north-easterly side thereof 291 feet 6 inches, on the northerly side thereof 330 feet, and on the southerly side thereof 140 feet, and admeasuring in the whole 7752 square yards or thereabouts, be the same more or less, and bounded on or towards the west by a new road leading from the *Leeds and Bradford Railway* to the iron bridge some time since erected by *John Pollard*, Esq., deceased, over the River *Aire*, called *New Laithes Bridge*, at *Newlay* aforesaid, on or towards the east or north-east by other land belonging to the said *J. Micklethwait*, on or towards the north by the River *Aire*, and on or towards the south by a new road twenty-four feet in width running, &c., And also all those dye-works, cottages, and buildings now standing upon the said parcel of land late in the tenure or occupation of &c., but now of the said *Joseph Lowden* or his undertenants, And all other erections and buildings, additions and improvements, recently made by the said *J. Lowden* upon the same parcel of land or some part thereof which said parcel of land, with the dye-works, cottages, and buildings thereon are more particularly delineated and described in the plan drawn on the second skin of these presents and thereon coloured pink, Together with all and singular houses, outhouses, ways, roads, paths, passages,

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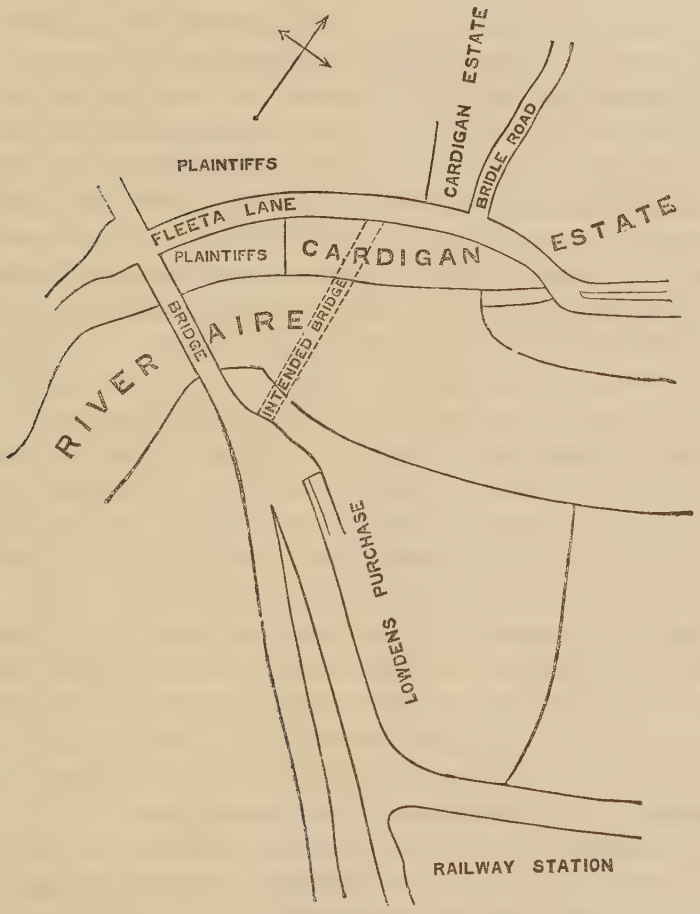
waters, watercourses, wells, drains, fences, rights, liberties, easements, profits, privileges, advantages, and appurtenances whatsoever to the said land, dye-works, buildings, and hereditaments expressed to be hereby conveyed, or any part thereof, belonging or appertaining, or with the same or any part thereof usually held, occupied, or enjoyed, And particularly a right of road, way, and passage for the said *J. Lowden*, his executors, administrators, and assigns, and his and their servants, &c., to pass and repass with or without horses, cattle, carts, and other carriages to, over, and from the said iron bridge called *New Laithes Bridge*, on payment of the usual and accustomed tolls heretofore paid in respect thereof to the said *J. Micklethwait*, his heirs and assigns, And also a right of foot, horse, and carriage road for all purposes and on all occasions for the said *J. Lowden*, his heirs and assigns, owners or occupiers of the said hereditaments, or any and every part thereof, and all other persons having occasion to pass or repass to or from the same or any and every part thereof, from time to time and at all times hereafter through, over, and along the said new road on the west side of the said parcel of land leading from the *Leeds and Bradford Railway* to the said bridge called *New Laithes Bridge*, and through, over, and along the said new road twenty-four feet wide recently made on the south side of the said parcel of land expressed to be hereby conveyed," And all remainders, &c., And all the estate, &c., to hold the premises to *Lowden* and his heirs to uses to bar dower, "Saving, excepting, and reserving nevertheless to the said *J. Micklethwait*, his heirs and assigns, the use and enjoyment of all the surplus water to be hereafter in the reservoir situate in the said parcel of land expressed to be hereby conveyed after the wants and necessities of the said *J. Lowden*, his executors, administrators, or assigns, shall have been supplied, with power and authority for the said *J. Micklethwait*, his heirs and assigns, at any time hereafter and from time to time to enter into and upon the said hereditaments and premises, to make, construct, repair, renew, and maintain all such channels, culverts, pipes, and other works as may be requisite or advisable to such use and enjoyment of the said surplus water, And also saving, excepting, and reserving to the said *J. Micklethwait*, his heirs and assigns, the right and

privilege, with or without workmen, agents, and others, horses and carts, and with all suitable and requisite materials and implements, of entering from time to time into and upon the said hereditaments and premises expressed to be hereby conveyed, or any part thereof, for the purpose of renewing, altering, repairing, and amending the said iron bridge called *New Laithes Bridge*,



and the toll-house and buildings thereto adjoining, he and they, and his and their servants, agents, and workmen, doing as little damage as may be, and paying to the said *Joseph Lowden*, his executors, administrators, or assigns reasonable compensation for all such damage as may be thereby done or occasioned." There

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followed a covenant by *Lowden* for the repair of that part of the new road twenty-four feet wide which adjoined the southern side of the land, and a covenant by him that all cottages and dwelling-houses to be built by him, his heirs or assigns, on the land should be at least four feet from the new line of road leading to *Newlay Station*, in case they should front that road. Then followed covenants for title and the production of title deeds, and the deed ended with a declaration and agreement "that nothing in these presents contained shall affect, prejudice, or interfere with any right of the said *J. Micklethwait*, his heirs and assigns, at present existing to take rent or toll in respect of and as a compensation for all or any person or persons, horses, and other animals, carts, and other carriages having occasion to pass and repass on, over, and along any part of the lane, road or way of the said *J. Micklethwait* leading to and from the *Leeds* and *Bradford* turnpike road, near to the *Acorn Inn*, through *Newlay*, to, into, and from the township of *Horsforth* and over the said iron bridge called *New Laithes Bridge*."

The property conveyed was, on the plan referred to by the above deed, coloured pink up to the edge only of the river; and the bed of the river *ad medium filum*, was not included in the dimensions stated in the deed. Had it been included the surface would have been 10,031 square yards instead of 7752, a difference of 2279 square yards.

The bridge referred to in the above deed was a private bridge erected by *John Pollard*, a predecessor in title of *John Micklethwait*, upon his own property, which at the time of the conveyance belonged to *John Micklethwait*. There was no public right of way over the bridge, but persons, horses, cattle, and carriages were allowed to pass on payment of tolls.

In 1880 the *Midland Railway Company* purchased the property comprised in the conveyance to *Lowden*, and under their auspices, in April, 1886, a company was formed for making a new girder bridge over the *Aire*, near *Newlay*, which it was intended to make a free bridge. The work was commenced on the land purchased from *Lowden*, and pillars were erected with girders upon them. The Plaintiffs, who were the successors in title of *John Micklethwait*, commenced this action against the *Newlay*

Bridge Company and its directors for an injunction to restrain them from interfering with the rights of entry upon this land given by the conveyance of the 7th of March, 1854, for the purpose of repairing the old bridge, and from erecting or allowing to continue any structure over the bed of the river, and from trespassing upon *Fleeta Lane*.

It will be seen from the accompanying plan that the intended bridge was to cross the river from the land of the *Midland Railway Company* to land of Lady *Cardigan's* trustees, over which the road was to be carried into *Fleeta Lane*, at a point where the lane lay between land of the Plaintiffs and land of the *Cardigan* trustees. The Plaintiffs alleged that the whole soil of the lane at this point belonged to them, and that the lane was not a public but a private road. On these points there was a conflict of evidence. The *Cardigan* trustees approved of the erection of the new bridge. As appears from the plan, no part of the works proposed was carried over land of the Plaintiffs if the conveyance to *Lowden* passed the soil in the bed of the river *ad medium filum*. There was a conflict of evidence as to whether the works deprived the Plaintiffs of reasonable and convenient access to the old bridge for the purpose of repairing it, and some of their witnesses gave evidence to the effect that it was necessary for convenient access that the whole of the narrow piece forming the western portions of *Lowden's* purchase should remain wholly unbuilt upon.

An injunction was applied for before Vice-Chancellor *Bacon*. The question as to the construction of the deed of conveyance was not much argued, and the Vice-Chancellor was under the impression that, at the place where the bridge was to cross, the Plaintiffs were at all events entitled to one half of the bed of the river. He made an order restraining the Defendants until the hearing from interfering with or obstructing the rights of the Plaintiffs to enter upon the land for the purpose of repairing their bridge, and of taking toll in respect of any person passing and repassing along any part of the Plaintiffs' road to or over the bridge; and from erecting or permitting to remain any bridge, chain, wire, or other obstruction over any part of the river extending along the boundary of the land comprised in *Lowden's*

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purchase; and from trespassing upon or interfering with the enjoyment by the Plaintiffs and their tenants of *Fleeta Lane*.

The company and the directors severally appealed.

Macnaghten, Q.C., and *Phipson Beale*, for the company, and *Byrne*, for the directors:—

The Vice-Chancellor decided this case under the erroneous impression that indisputably half the bed of the river where the proposed bridge is to cross it belongs to the Plaintiffs, even if the conveyance to *Lowden* passed a half. If that were so the Plaintiffs would be entitled to an injunction to restrain us from building over it. But half of the bed of the river there belongs to the *Cardigan* trustees, and we say that the other half was included in *Lowden's* purchase, so that the bridge will not go over anything belonging to the Plaintiffs. The conveyance to *Lowden* in 1854 passed one half of the bed of the river adjoining the land described in it. The law on this point is very clearly summed up by Mr. Justice *Fitzgerald* in *Dwyer* v. *Rich* (1): "The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *primâ facie* presumption is, that the parties intended to include in the grant a moiety of the road or of the river bed, as the case may be; and that such general presumption ought to prevail, unless there is something to indicate a contrary intention . . . . and the authorities seem further to establish that this general presumption is not to be considered as rebutted by this circumstance alone, that the subject of the grant is described as abutting on or bounded by the road or river, or that the quantity of land specifically described as granted is satisfied without including the half of the road or river, or that the grant refers to a map or plan in which the half of the road or river is not included. To rebut the general presumption, there must be something in the language of the grant indicating an intention to exclude or something in the subject-matter or in the surrounding circumstances from which such an intention may reasonably be inferred." Thus in *Lord* v. *Commissioners of Sydney* (2), half a creek was held to

(1) Ir. Rep. 6 C. L. 144, 149. (2) 12 Moo. P. C. 473.

pass in a grant from the Crown; and in *Berridge* v. *Ward* (1) half a highway, though the land was described by reference to boundaries and colouring which did not include any part of the road. In *Beckett* v. *Corporation of Leeds* (2), it was doubted whether the presumption that an adjoining owner is entitled to half the road applies to a street in a town, but that has no application here. As to the reservation of the right to enter on this land for the purpose of repairing the old bridge, it cannot be construed as giving the Plaintiffs a right to go over every portion of *Lowden's* land, it can only mean that they are to have reasonable and convenient access to the bridge over it, and our evidence shews that this will not be prevented. As to the Plaintiffs' right to take tolls, we are in no way interfering with it. They merely take tolls by virtue of their ownership, and have no monopoly of taking people across the river. If they meant on the sale to *Lowden* to prevent the erection of a new bridge, they ought to have taken a covenant not to erect one. The proviso at the end of the deed was merely inserted *ex abundanti cautelâ*, to prevent the question whether the grant of a right to use the old bridge did not take away the liability to pay tolls for using it. As to *Fleeta Lane*, there is evidence that it is a public road, for it is the only communication between the road going over the old bridge and a public bridleway; but if it be not a public road, it is to be presumed that half of it, at the part where the road over the new bridge will enter it, belongs to the *Cardigan* trustees, and there is no case made out for an injunction restraining us from trespassing on it.

Marten, Q.C., *Romer*, Q.C., and *E. S. Ford*, for the Plaintiffs:—

The balance of convenience and inconvenience is here in favour of keeping matters *in statu quo* till the hearing, and an injunction ought to be granted: *Newson* v. *Pender* (3). Now as regards the moiety of the bed of the river, the presumption that a vendor sells the half of a river adjoining the land he conveys, arose in cases of conveyances by a person who was owner of a single tenement with half the road adjoining it, and when he conveyed it

(1) 10 C. B. (N.S.) 400. (2) Law Rep. 7 Ch. 421.
(3) 27 Ch. D. 43.

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was most unlikely that he should intend to retain such a useless thing as the half road, it being his *primâ facie* intention to part with all he had. That this was the origin of the rule is shewn by the observations in *Lord* v. *Commissioners of Sydney* (1). In that case the Crown was apportioning land among colonists, and the intention to retain the soil in the creek was improbable.

[LINDLEY, L.J. :—Is there any case as to the effect of a conveyance where a private person, being owner of the property on both sides of the road, sells property on one side ?]

We believe not, unless *Dwyer* v. *Rich* (2) be such a case, and the facts there are very obscurely stated. We submit that where the grantor owns both sides of the stream the presumption does not arise, as he is not parting with his whole property. *Berridge* v. *Ward* (3) was a case of conveyance by an owner who had no other property. These are all the cases on which the Appellants rely. Now, in *Beckett* v. *Corporation of Leeds* (4) it appears from the observations of Lord Justice *James* that the circumstances must be looked at to see whether it was the intention of the grantor to retain the half road. His Lordship says he should be slow to hold, where there is a road going through an estate, that a grant for the site of a house of a piece of land adjoining the road passes the soil *ad medium filum*. This principle is illustrated by *Plumstead Board of Works* v. *British Land Company* (5), where neither the colouring on the plan nor the measurement included the half road, and it was held that it did not pass. The decision on appeal (6) did not bear on this point. That case is almost identical with the present—neither colouring nor admeasurement includes the half bed. In *Leigh* v. *Jack* (7) the land *ad medium filum* of an intended new street which had never been dedicated to the public was held not to pass, because the vendor had something to do on the land, and had an object in retaining it. Here the Plaintiffs had an interest in retaining the bed of the river, for their doing so would make it impossible to erect another bridge from this land. One of the chief reasons on which the presump-

(1) 12 Moo. P. C. 473.
(2) Ir. Rep. 6 C. L. 144.
(3) 10 C. B. (N.S.) 400.
(4) Law Rep. 7 Ch. 421.
(5) Ibid. 10 Q. B. 16.
(6) Ibid. 203.
(7) 5 Ex. D. 264.

tion rests is here against the Defendants, and the colouring and admeasurements are also against them. Land here was expensive; the additional land was to be paid for at £800 per acre, and it would be very extraordinary for half an acre to pass without any compensation. This is not like a conveyance out and out—there are special reservations.

[LOPES, L.J.:—If the grantor intended to reserve the bed of the stream, why did he not include it in his exceptions?]

He, no doubt, considered that the colouring and acreage had excluded it. The building of the bridge ought therefore to be restrained as a trespass. On the balance of convenience the building ought to be stopped, for the Plaintiffs cannot use the bridge, if made, except by trespassing on *Fleeta Lane*. The making this bridge is a breach of the stipulation that the tolls shall not be prejudiced.

[COTTON, L.J.:—The stipulation is only that nothing in the conveyance shall prejudice the right to tolls—not that nothing shall be done to prejudice them.]

On the evidence reasonable access for repairing the Plaintiffs' bridge will not be left.

Phipson Beale, in reply:—

As regards the bed of the river, *Lowden* bought a property bounded by the river *Aire*, and there is nothing to exclude the *primâ facie* conclusion that the intention of both parties was that he should have the ordinary rights of a riparian owner and be owner *ad medium filum*. In the *Plumstead Case* the Court came to the conclusion, on the construction of a particular instrument, that an intention by the grantors to retain the soil of the streets was shewn. As to *Fleeta Lane* there is evidence tending to shew that it is a public road, and there is no evidence that the half of it which adjoins the *Cardigan* property belongs to the Plaintiffs. Unless it does, the bridge can be used by the consent of the *Cardigan* trustees.

1886. July 22. COTTON, L.J.:—

This is an appeal by the Defendants from an order made by Vice-Chancellor *Bacon* granting an injunction restraining both the

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company and its directors from erecting a bridge, and also from committing a trespass on a road claimed to belong to the Plaintiffs, on which the northern approach to a bridge belonging to the Plaintiffs abuts. The substantial question is as to the construction of the bridge. That is the main point of interest to the Plaintiffs, because they have a bridge close to the place on which it is intended to put up the bridge of the Defendants, and they charge a toll for foot passengers, and, I suppose, also for carts, but the bridge to be erected by the Defendants is intended to be a free bridge.

Four points were urged on behalf of the Plaintiffs. The first was this: that the half of the bed of the river adjoining the land of the Defendants belongs to the Plaintiffs and is vested in them, and that therefore it was an act of trespass to carry a bridge over that portion of the river. That contention turns on the true construction of the conveyance of the 7th of March, 1854. Up to the date of that conveyance the predecessors in title of the Plaintiffs were owners of the land comprised in it and of part of the land lying opposite to it on the other side of the river. They had a great deal of other property in the neighbourhood, and in that year they made a conveyance to *Joseph Lowden*, who was the predecessor in title of the Defendants. That conveyance followed a lease which had been previously granted to *Lowden*, and which gave the lessee an option to buy the land comprised in the lease and certain additional land. One great point made on behalf of the Plaintiffs was that the lease provided that the quantity of additional land to be bought should not exceed an acre, and gave the price very definitely. The property conveyed was described in the conveyance, and shewn in the plan annexed to it, as bounded on the west by a new road leading to the bridge which now belongs to the Plaintiffs. The Defendants are proposing to put their bridge a little to the eastward of the bridge of the Plaintiffs, with an approach starting from the new road and made upon land of the Defendants, and then the bridge is to cross the river to the land of the *Cardigan* trustees. There is some dispute about the reservation of a strip of land between the property conveyed to *Lowden*, and the bed of the river, but that was lower down, and there is no doubt that the piece of land conveyed to *Lowden* comprised the bank of the river at the spot in

question. The conveyance comprised the land specified and marked out by metes and bounds, but it described it as bounded on the north by the river, and there are large general words, "together with all ways, waters, watercourses," &c. I do not myself place reliance on those general words, but they are certainly as wide as the general words upon which stress was laid in one of the cases quoted to us. But the question is whether this conveyance of a piece of land described by quantity of yards, and described as being bounded on the north by the river, carries with it as part of that which was conveyed the right to the soil *ad medium filum aquæ*. In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to shew that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted. In my opinion, you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which shewed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river. There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply, but in my opinion it is not sufficient that circumstances which afterwards occur shew it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road. It may be that if the vendor and purchaser had thought of those circumstances they would have introduced into the conveyance something to shew that the half of the bed of

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the river was not to pass, but the mere fact that circumstances not within the contemplation of the parties at the time afterwards arise, which shew it to have been to the disadvantage of the vendor that the soil of half of the river should pass, will not, in my opinion, prevent the presumption from arising.

Before considering the circumstances of the present case I will refer to some of the cases which were quoted in order to shew that the law is as I have stated. In *Lord* v. *Commissioners of Sydney* (1), where there was a grant by the Crown of a piece of land described as bounded on one side by a creek, it was held that even as against the Crown the grant must be taken to pass the soil of the creek up to the middle. The case of *Berridge* v. *Ward* (2) is very important, because there, although the map annexed to the conveyance coloured the land only to the edge of the highway, one half of the highway was held to pass by the conveyance. The rule as to the presumption is there laid down, and the case is a very strong instance of its application. The case of *Leigh* v. *Jack* (3) was referred to, where the Court of Appeal held that the rule did not apply. That case is a good illustration of the circumstances which may shew that the presumption is not intended to apply to the particular conveyance. The property there was laid out for building, and there was an intended road which adjoined and bounded the plot which was conveyed to one of the parties. It was obviously necessary that the vendor should retain the soil of that intended road in order that he might construct and make it into a road and then dedicate it to the public. This object was shewn by the conveyance, for the road was described in it as an intended road, and the purchaser must have known that the half of it was not to pass to him.

It was very ably argued by Mr. *Romer* that the rule could only have arisen from its being useless to a vendor, when parting with his property, to retain an adjoining strip of land forming half the bed of a river or half the soil of a road. I think very likely that such was the origin of the rule, but when the rule is once established as a rule of construction, we are not at liberty to depart

(1) 12 Moo. P. C. 473. (2) 10 C. B. (N.S.) 400.
(3) 5 Ex. D. 264.

from it merely because it is shewn that it would have been to the interest of the vendor to retain the half of the bed of the river. If he was at the time known to himself and known to the purchaser to be about to do something on that strip of land which rendered it necessary for him to have the ownership, that rebuts the presumption; but the mere fact that it now appears that this strip of land is of use to him, although he had no intention at the time of the purchase of doing anything which would require it to remain in him, does not, in my opinion, enable us to depart from the rule. Here there is nothing in the circumstances to rebut the presumption, for there is nothing to shew that at the time when this conveyance took place, anybody was thinking about making another bridge. It did not become anybody's interest to do so till the railway company, or somebody for them, got this piece of land and wished to get a free bridge opened to the station, and the making of such a bridge would not have been possible unless the *Cardigan* trustees, who had the soil of the other half of the river, had assented to the building of the bridge. Nothing at the time of the conveyance was contemplated by the *Micklethwaits* which would render it necessary for them to retain the half of the bed of the river.

What is there in the language of the deed to help the Plaintiffs? In my opinion there is nothing. It was said that they ought to have the soil of this portion of the river in order that they might repair the bridge, but they had carefully provided that they should have a right of way for that purpose over whatever passes by the conveyance. They provide by the deed that nothing therein shall interfere with their right to take tolls, but they have not put in any provision preventing the erection of a bridge, and if it had been contemplated then that they should have this piece of land in order to prevent another bridge being built they would have put in something to shew such intention. I do not say that it is affirmatively shewn that the intention of the parties was that this half of the bed should pass; they probably never thought about the point. I go upon this, that a contrary intention is not expressed or made manifest in such a way as to exclude the presumption. In my opinion, therefore, the presumption must apply, and the deed must be held to have

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passed not only that which was described and coloured but the adjoining half of the soil of the river.

It is said that this is very extraordinary, because this half of the river bed is about a fourth of the whole quantity of the land, and the purchasers will get it for nothing. The price really was given for that which was not covered by water; the part covered by water would not be available for what was then in contemplation, and no price would be asked for it. The bed of a stream, it must be remembered, is vested in the owners subject to all the rights of upper and lower riparian proprietors, and the ownership of a moiety of it is not very important, unless some such case as the present, which is of an extraordinary character, arises.

The Vice-Chancellor seems to have considered that it was an admitted fact that half the bed of the river belonged to the Plaintiffs; and if that had been so I should have agreed with him that an injunction ought to be granted; but I take a different view of the facts, and, in my opinion, the erection of the bridge cannot be prevented on the ground that the half of the bed of the river adjoining the Defendants' land belongs to the Plaintiffs.

The Plaintiffs relied on some of the provisions in the conveyance, and first on the reservation to the vendors of a right of entry on the property, or any part of it, for the purpose of repairing the bridge. As far as I understood the Plaintiffs' argument it would lead to this, that nothing whatever could be done on this land which would in any way prevent a right of way over the whole of it. That, in my opinion, is wrong. In my judgment the reservation only gave the Plaintiffs a right to require that there should be a reasonably convenient access to the bridge. Now the access to the new bridge is on pillars, and the pillars stand at a distance of 13 feet. In the interval between the pillars nearest the River *Aire* there is now not a very great headway because there is some rubbish under it, but when that rubbish is removed there will be a headway of from 9 to 10 ft. In my opinion it cannot be said that under these circumstances the Defendants have not left to the Plaintiffs reasonable access to repair their bridge.

The Plaintiffs also rely on the proviso at the end of the deed

that nothing therein contained shall prejudice or interfere with any right of the grantor to take tolls. [His Lordship read the proviso.] It is said that what the Defendants are doing is a breach of this proviso. How? Because it is said the erection of this new bridge will take away the passengers and therefore deprive the Plaintiffs of their tolls. But it does not in any way affect, prejudice, or interfere with their right to take tolls. That is a very different thing. I think this proviso was inserted *ex abundanti cautelâ* to make it clear that the grant to *Lowden* of the right of passing over the bridge was not to be considered as in any way interfering with the grantor's right to take tolls and to regulate the tolls as he thought fit. But what is being done by the Defendants, even if it does within the meaning of this clause interfere with or prejudice the Plaintiffs' right to take tolls, is not something "contained in these presents" but is outside the deed, and the deed contains no stipulation to prevent their doing it.

As regards the alleged intention to commit a trespass in *Fleeta Lane* we have not full materials. The Plaintiffs allege that the whole of *Fleeta Lane* at the point where the road from the proposed new bridge enters it belongs to them, subject to a right of passage in the tenants of the *Cardigan* trustees, and that the making the proposed entrance into it will be a trespass. Now it may be that at the hearing the Plaintiffs may establish their exclusive right to that lane. At the present moment that seems to me not probable. As far as I can see it is most probable that at the point where the alleged trespass is said to be about to be committed the *Cardigan* trustees are entitled to one-half of this lane, and the entrance is going to be made on that half. If the Plaintiffs at the hearing make out the case of trespass they will be entitled to an injunction against the continuance of it; but as far as I can see at present they do not make out such a *primâ facie* case as would justify our interfering by interlocutory injunction, since the refusing it will not expose the Plaintiffs to any great loss or danger, even if they should ultimately turn out to be right. Of course this case of trespass on *Fleeta Lane*, if established, would not be any ground for interfering with the erection of the bridge. In my opinion the injunction must be discharged.

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LINDLEY, L.J.:—

I am of the same opinion. Vice-Chancellor *Bacon* has by the order appealed from restrained the Defendants from doing four things. The first is "from interfering with or obstructing the rights of the Plaintiffs of entering from time to time upon the hereditaments comprised" in the conveyance of 1854 "for the purpose of renewing, altering, repairing, and amending the bridge called *Newlay* Bridge crossing the River *Aire*." With reference to that point it is material to consider what rights the Plaintiffs have reserved to themselves by that deed of conveyance. The rights reserved are rights of entering upon the land for the purpose of repairing their bridge. The Plaintiffs have reserved these rights by words which I need not stop to read, but the true interpretation of which appears to me not to be that the Plaintiffs have reserved to themselves a right to go anywhere and everywhere over the ground for the purpose of repairing their bridge. The clause must receive a reasonable construction, and that reasonable construction is this, that they have reserved to themselves and are entitled to a reasonable right of access to their bridge over the land granted, for the purpose of repairing that bridge; and if it was proved that the Defendants were in any way interfering with such reasonable access, this part of the injunction would be right. But in point of fact there is not at this moment any necessity for obtaining access to the bridge for repairs, and the fact that there is some rubbish under one of the arches of this bridge, which rubbish so long as it is there leaves scarcely sufficient headway for reasonable access to the bridge, is therefore immaterial, since that rubbish of course will not remain there permanently. There is no evidence to shew that the Defendants intend permanently to erect anything which will obstruct the Plaintiffs in their right of access for the purpose of repairing. It appears to me therefore that this part of the injunction cannot be sustained.

The second thing that the Vice-Chancellor has restrained the Defendants from doing is from interfering with or obstructing the rights of the Plaintiffs of taking toll in respect of any person passing and repassing along any part of the road of the Plaintiffs over the bridge. The predecessor in title of the Plaintiffs by

the deed of conveyance of 1854 granted to the purchaser and persons claiming under him a right to use this bridge on paying the tolls theretofore taken. There was also a grant to the same persons of a right to use a new road leading to the bridge. Then there is at the end of the conveyance a proviso to which Lord Justice *Cotton* has just referred, and which I need not repeat, preserving the Plaintiffs' right to take tolls over that bridge. Now, let us see what the Plaintiffs' right is in that respect, and how far the Defendants are infringing it or will infringe it. The Plaintiffs' right is not to have people go over their bridge. They are not like the owner of a ferry or a bridge who has a monopoly. People are not bound to go over the Plaintiffs' bridge in order to cross the river. They may ferry across if they can get access. The right of the Plaintiffs is simply to say to people who want to go over the bridge, "You shall not go except on our terms, because the land is ours." Those being the rights of the Plaintiffs, are the Defendants infringing them? It appears to me that they are not infringing them in the slightest degree, assuming even that they erect a free bridge, which will of course practically divert a great part of the traffic from the Plaintiffs' bridge. If the Plaintiffs had a right to have that traffic, if they had a right to exclude people from crossing the river except by their bridge, then the Defendants would in my judgment be interfering with the Plaintiffs' right to toll. But with such right to toll as the Plaintiffs have the Defendants are in no way interfering. That part of the injunction, therefore, as it appears to me, cannot be supported.

The third thing which the Vice-Chancellor has restrained the Defendants from doing is "from erecting or causing or permitting to be erected or to remain any bridge or other building, chain, wire, or other obstruction upon or over the bed of the river extending along the boundary of the premises comprised in the conveyance." It appears to me that this part of the injunction can only be supported on the ground that the Plaintiffs are the owners of a portion of that part of the bed of the river over which the bridge will stand. If they were so entitled, and the Vice-Chancellor evidently thought they were, then this part of the injunction would be almost a matter of course. But the question is whether

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the Plaintiffs are or are not the owners of the southern half of the bed of the river. That depends upon the true construction of the deed of conveyance, and in order to determine what is its true construction we must look at its terms, and at those circumstances which are legitimately in evidence for the purpose of construing it, such as the position of the property and the circumstances under which the deed was executed. There obviously is nothing on the face of the deed which shews an intention to reserve to the grantor any portion of the bed of this river. The grant is of land delineated in a plan and therein coloured pink, and described by quantity and as abutting on the north on the River *Aire*. Neither the colouring on the plan nor the quantity named includes the half bed of the river. When we come to apply the ordinary and well-settled rules of law to that conveyance, we find it settled by authority which it is impossible for us to ignore or overrule, that those circumstances as to colouring and quantity do not alone prevent a moiety of the bed of the river from passing. The law upon that subject is not new. The earliest authority on the subject I have found is that referred to in Mr. *Elphinstone's* very useful book on the interpretation of deeds. *Rolle's* Abridgment, "Grants," *P.*, pl. 6: "*Si home grant un messuage vocatum Falstolfe Place prout undeque includitur aquis; per ceux parolls le soile del motes en que le ewe est passera. P.* 9, Car. B. R. *Enter Stint & Morgan per curiam resolve sur un trial al barr.*" From that time down to this the rule has been laid down and acted upon as an ordinary rule of conveyancing, a well-settled law of real property, and it has been expressed in various ways by the Courts when necessity has arisen to discuss it, and nowhere that I know of better than in *Berridge* v. *Ward* (1) and *Dwyer* v. *Rich* (2). There are other cases which are collected by Mr. *Elphinstone*, and at which I have looked, but I think it is needless to refer to them, because they all go one way, and they all shew this, that upon such a conveyance as we have to deal with here half of the bed of the river passes to the grantee unless circumstances can be shewn which will exclude the application of that rule. There are cases in which the circumstances were held sufficient. One was the case of the market-place at *Leeds:*

(1) 10 C. B. (N.S.) 400. (2) Ir. Rep. 6 C. L. 144.

Beckett v. *Corporation of Leeds* (1). There was the case of *Marquis of Salisbury* v. *Great Northern Railway Company* (2), where the road was described in a map with a separate number, and it was quite obvious when you looked at it that it was not intended to pass. Then there was *Leigh* v. *Jack* (3), about the dedication of the intended highway, where, as it was pointed out by Lord Justice *Cotton* in his judgment, the intention of both parties would have been defeated if it had passed. Of course, if the grantor could shew in this case any such circumstances the rule would be excluded, but it is for him to exclude it, and it appears to me that there are here no circumstances sufficient for the purpose. What are the circumstances on which the Plaintiffs rely? They rely on their ownership of the bridge, on the fact that the grantor was the owner of the opposite bank of the river, and upon the absence of any intention to pass it, and in addition on the colouring of the map and the quantities. According to the course of the authorities, it appears to me that whether you take these circumstances separately or in combination they are not sufficient for the purpose, and we cannot help seeing perfectly well that this point about the bed of the river never occurred to either party. It did not appear to either of them to be of the slightest importance. There was no intention, therefore, to exclude the operation of the general rule, and the general rule applies because it was not intended to exclude it. That the grantor would have excluded it if he had seen what was going to happen is quite possible. It is also probable enough that if he had seen what was going to happen he would have insisted on the introduction of a covenant not to set up another bridge. But that is all pure speculation, and, in my opinion, it would be unsettling a perfectly well-known rule of real property law if upon the materials before us we held that the half of the bed of this river did not pass to the grantee.

Now that being the case, the injunction against erecting this bridge cannot be supported on the ground that it is to be erected over land of the Plaintiffs, and, as I have shewn, the erection of it will not interfere with such right as the Plaintiffs have of taking

(1) Law Rep. 7 Ch. 421. (2) 5 C. B. (N.S.) 174.
(3) 5 Ex. D. 264.

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toll from those who want to pass over their bridge, and there being no covenant not to erect a bridge, there is no ground on which the injunction against erecting it can be supported.

Then we come to the last point. The Vice-Chancellor has restrained the Defendants from "trespassing upon or otherwise interfering with the enjoyment of the Plaintiffs and their tenants of *Fleeta Lane*, situate at *Horsforth*, in the said county of *York*." Whether that part of the injunction can be maintained or not depends upon circumstances which possibly may be made more clear hereafter than they are now. The Plaintiffs say that *Fleeta Lane* is their property, but there is a considerable amount of evidence to shew that it is a public highway. The Defendants are about to make an opening into that lane, and the right being in dispute, I think I may say the balance of the evidence at present being rather against the Plaintiffs than in their favour, it is not a case for an interlocutory injunction. It is possible that the Plaintiffs may prove at the hearing that they are right, and the Defendants may find that they have expended their money on a bridge which cannot be used; but I think that there is no sufficient case made out in favour of the Plaintiffs to justify the injunction on that ground. It appears to me, therefore, that the appeal must be allowed and the injunction dissolved.

LOPES, L.J.:—

It is said that an injunction ought to be granted in this case, in the first place because a moiety of the bed of the river belongs to the Plaintiffs, and the Defendants are trespassers in erecting a bridge over it. If that was made out it would be good ground for granting this injunction, and the Vice-Chancellor proceeded on that ground, assuming, as it appears, that a moiety of the bed of the river belonged to the Plaintiffs.

With regard to this part of the case an important question arises as to the true construction of the grant to *Lowden*. Did a moiety of the bed of the river pass to *Lowden*, or did that moiety remain in the grantor? I am clearly of opinion that a moiety of the bed of the river passed to *Lowden*. I do not propose to go through the authorities which have already been referred to by Lord Justice *Cotton* and Lord Justice *Lindley*. I will satisfy

myself by stating what I believe, after a careful examination, to be the result of those authorities. It appears to me to be this: that if land adjoining a highway or a river is granted, the half of the road, or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road.

That appears to me to be the result of the authorities, and I will shortly apply it to the present case. In the first place, is there anything in the language of the deed to exclude this presumption? It appears to me there is nothing. There are special reservations to which reference has been made, and I rather infer from them that there was no intention of excluding the presumption, because it appears to me that the grantor was fully alive to his rights and as to what he desired to do, yet he makes no reservation whatever with regard to the bed of the river. I think, therefore, there is nothing in the language of the deed to exclude the presumption. Then, is there anything in the nature of the subject-matter to exclude the presumption? I think there is nothing. This is a grant of a piece of land. I can see nothing in such a grant to exclude the presumption. Then, is there anything in the surrounding circumstances to exclude it? It is said that the existence of the toll-bridge of the Plaintiffs excludes the presumption, because it was valuable property which belonged to the grantor at that time, which would make it probable that he intended to reserve and keep in his hands the bed of the river. I cannot draw that conclusion. The true state of things appears to me to be that it never occurred to the minds either of the grantor or grantee that any bridge of this kind would be ever erected. Nor, indeed, could this bridge have been erected unless there had been a concurrence on the part of the *Cardigan* trustees. Therefore, I think on all these grounds that that part of the case fails, and that half of the river passed to *Lowden*.

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Then it is said that the injunction ought to be granted because there is a reservation of the right of entry to do certain repairs to the toll-bridge. That raises the question as to what the true construction of that reservation is. I read it in this way, that it is a reservation of reasonable facilities, as occasion might arise, to do the necessary repairs to the bridge—a reservation of a fairly commodious access to the bridge. Now, according to the evidence, it appears to me that there is still, and will be after this bridge is made, a fairly commodious access to the bridge, quite sufficient to do any repairs which may be necessary. I think, therefore, on this ground, that the claim to this injunction fails.

Then another ground which was taken is this:—It is said that when this bridge is erected, foot-passengers will be discharged upon a certain lane called *Fleeta Lane*, which is the property of the Plaintiffs, and that that lane will be trespassed upon. Now, it appears to me that the Plaintiffs' rights to that lane are most doubtful. I am rather inclined myself to think that the weight of the evidence before us at this time is against its being a private road, and in favour of its being a highway; but I desire to express no definite opinion on that. It is sufficient to say that the rights are so doubtful that it would not be right to grant an injunction on that ground.

The only other matter is with regard to the proviso at the end of the deed, and I entirely agree with what has been said already with regard to that, viz., that what the Defendants are doing is no infringement of the Plaintiffs' rights. I think, therefore, that the appeal ought to be allowed.

Solicitors for Plaintiffs: *Ridsdale & Son*, agents for *Turner, Leeds.*

Solicitors for the Company: *Beale & Co.*

Solicitors for the other Defendants: *Torr, Janeways, & Co.*

H. C. J.

MARQUESS OF BUTE *v.* JAMES.

V.-C. B.
1886
June 25.

[1886 B. 2153.]

Practice—Action to perpetuate Testimony—Delivery of Defence, Default in—Leave to proceed as if Pleadings closed—Witnesses—Country Examination—Special Examiner—Examiners of the Court.

In an action to perpetuate testimony, the time for delivery of defence having expired, and the Defendant not having applied for an extension of time, the Plaintiff obtained, on motion, an order that the action might proceed notwithstanding the Defendant's default, and that he might be at liberty to examine the witnesses (one of whom was of advanced age and in failing health) as if the pleadings were closed.

It is not now the practice of the Court to appoint a Special Examiner to take a country examination, even, for instance, in a Welsh case where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language. In such a case the examination will be referred in the usual way to one of the Examiners of the Court, who is entitled, if necessary, to the assistance of an interpreter.

THIS was an action for perpetuation of testimony. The statement of claim alleged as follows:—

That the Plaintiff was lord of the manor of *Senghenydd* in the county of *Glamorgan*: that part of the waste of the manor was situate in the parish of *Gelligaer* and adjoined a freehold farm called *Bryncock*, held of the manor: that under the waste land were valuable minerals: that the Defendants, who were trustees of a will, claimed to be the owners of the *Bryncock* farm, and had lately set up some claim to be entitled to a part of the waste, alleging that the same formed part of the farm: that the Plaintiff was in possession of the waste and could not bring the title thereto into present judicial investigation: that the Plaintiff had proposed to the Defendants to arrange some mode whereby their claim might be tried, but that the Defendants hung back and declined to take any step or enter into any arrangement for that purpose, and purposely delayed their claim intending to bring it forward thereafter when the Plaintiff's witnesses were no longer in existence: that the Plaintiff had divers witnesses who could give evidence in support of his title to the said land, but that

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they or some of them were old and infirm, and if the matter was delayed their evidence was in danger of being lost.

The Plaintiff accordingly claimed to be at liberty to examine his witnesses in support of his title to the said piece of waste land situate in the parish of *Gelligaer*, and to have their testimony preserved and perpetuated. The statement of claim was delivered on the 1st of June, 1886. The time for delivery of the defence had expired, and no application had been made by the Defendants for extension of time. The Plaintiff, therefore, now moved "that that action might proceed notwithstanding the default of the Defendants in not delivering a statement of defence"; for the appointment of a solicitor (naming him) at *Cardiff* as Special Examiner; "and that the Plaintiff might be at liberty to examine the witnesses as if the pleadings were closed."

The motion was supported by an affidavit stating that it was intended to take the evidence of (among other witnesses) the hayward of the manor; that he was upwards of seventy-four years old and in failing health, and that it was very desirable that his evidence should be taken with as little delay as possible: also that as some of the evidence would probably be given in Welsh it was desirable that the proposed Special Examiner should be appointed, he being a fit and proper person and acquainted with that language.

Notice of the motion had been served on the Defendants but they did not appear.

Vaughan Hawkins, for the motion:—

In a suit to perpetuate testimony under the old practice issue must have been joined before the evidence could be regularly taken. But the present rules do not enable a Plaintiff to join issue or close the pleadings for default of defence: they only authorize him to set down the action on motion for judgment, which cannot be done in the case of an action to perpetuate testimony, as no judgment can be made in it. It is therefore necessary to proceed by analogy to the old practice, where the defendant would not put in an answer. In such a case the Plaintiff could obtain leave to sue out a commission to examine the witnesses as if the cause were at issue: *Coveny* v. *Athill* (1),

(1) 1 Dick. 355.

followed in *Lancaster* v. *Lancaster* (1); *Daniell's* Chancery Practice (2). A defendant cannot by making default in delivering his defence defeat the plaintiff's right to the relief he asks.

BACON, V.-C.:—

I cannot allow the course of the proceedings in the action to be stopped by the Defendant's default; and as I know of no other mode of proceeding by which, the pleadings not having been closed, the Plaintiff can attain the object he seeks, I make the order as asked, that the Plaintiff may be at liberty to proceed notwithstanding the Defendant's default and examine the witnesses as if the pleadings were closed. I make the order on the authority of the case in *Dickens*, who, as he was a Registrar of the Court, may be considered as an authority entitled to respect on points of practice though not perhaps of law. As regards that part of the motion which asks for the appointment of a Special Examiner, I cannot accede to that. Under the present practice of the Court a body of Examiners has been appointed to whom are to be referred in rotation examinations of witnesses, and I cannot depart from that practice. If the Examiner who goes down to take the examination does not understand Welsh he must have the assistance of some one who does. The order will direct that the examination be taken before one of the Examiners of the Court in rotation.

Solicitors: *Farrar & Co.*

(1) 6 Sim. 439.

(2) 6th Ed. p. 1513.

G. I. F. C.

KAY, J.
1886
June 23.

In re CORSELLIS.
LAWTON *v.* ELWES.

[1881 C. 5526.]

Trustee—Solicitor-Trustee—Profit Costs.

E., a partner with *T.* in a firm of country solicitors, was one of the two trustees of a will containing no power authorizing him to charge for professional services done in relation to the estate.

E. and his co-trustee *F.* were Respondents to an application for maintenance by a next friend on behalf of an infant, under the summary procedure of the Court, and *E.'s* firm, through their *London* agents, acted as solicitors for *E.* and his co-trustee in the matter, and made profit-costs.

E. afterwards became sole trustee, and being made Defendant to an action to carry into execution the trusts of the will, the *London* agents of his firm acted as his solicitors in the action, and credited his firm with a portion of their profit costs.

During the proceedings in the action, a receiver was appointed, and *E.'s* firm, by their *London* agents, acted as solicitors of the receiver, and were paid certain profit costs for so doing:—

Held, upon the principle that a trustee is bound to check all charges against the estate, and must not place himself in a position where his interest conflicts with his duty, that none of such profit costs ought to be allowed out of the estate to the firm of which *E.* was a member.

Cradock v. *Piper* (1) commented on and distinguished.

During *F.'s* lifetime, *E.* and *F.* appointed *E.'s* partner, *T.*, to be steward of a manor which was part of the trust estate, and fees for manorial business were paid by the tenants of the manor to *T.* as such steward, a share of the profit costs arising from which was claimed by *E.* *E.* also claimed a share of certain profit costs paid to his firm by lessees and others in respect of leases and agreements for leases of portions of the trust estate granted by *E.*, and prepared and carried out by him or his firm:—

Held, that neither *E.* nor his firm were entitled in either instance to such profit costs, but that *E.* must account for the same to the trust estate.

Adjourned Summons.

Nicholas Cæsar Corsellis, who died in 1878, by his will, dated in 1876, appointed and devised in strict settlement real estate of considerable amount, including the manor of *Wivenhoe*, and appointed as his executors and trustees *N. C. C. Lawton*, *Sayers Turner* (a solicitor carrying on business at *Colchester*, in partnership with the Defendant *Henry Hervey Elwes*), and *H. Firmin*.

(1) 1 Mac. & G. 664.

The will contained powers authorizing the trustees to employ receivers, bailiffs, accountants, agents, and others, in and about the affairs of the estates, at such salaries as they might think reasonable; but, with the exception of a power authorizing *Turner* by himself or his firm to act and make charges as solicitor for or in relation to his estate, the will contained no power authorizing a trustee who was a solicitor to make charges for professional services done in relation to the estate.

Sayers Turner died in February, 1880; and in pursuance of a power contained in the will the Defendant *H. H. Elwes* was appointed a trustee in his place.

N. C. C. Lawton died in May, 1881.

In August, 1881, before this action was brought, an application for maintenance out of the rents and profits of the real estates of the testator was made under the summary procedure of the Court on behalf of the infant tenant for life under the will. *Firmin* and the Defendant *H. H. Elwes*, as the surviving trustees of the will, were Respondents to this application, and the Defendant's firm at *Colchester*, which then consisted of himself and *George Beresford Turner*, acted through their *London* agents, Messrs. *Elwes & Sharpe* (in which firm the Defendant was not a partner), as solicitors for the Defendant and his co-trustee in the proceedings. The profit costs received by the Defendant's firm in respect of this application amounted to the sum of £16 19*s.* 2*d.*, and the Defendant claimed to be entitled to share therein.

After the death of *N. C. C. Lawton* the Defendant and his co-trustee, *Firmin*, appointed Mr. *G. B. Turner*, the Defendant's partner, to be steward of the manor of *Wivenhoe*, and he received from the tenants of the manor steward's fees for enfranchisements, leases, agreements, and other manorial business, and carried them to the credit of the firm, and the Defendant, as his partner, claimed to be entitled to share in the profits derived from such fees.

Firmin died on the 30th of September, 1881, and after his death this action was brought by the infant tenant for life against *Elwes*, as the sole surviving trustee, in order to carry into execution the trusts declared in the will of *N. C. Corsellis*, concerning the real estates therein comprised, and for the appointment of a

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receiver of the rents and profits of such real estate. *Elwes* was the only Defendant, and Messrs. *Elwes & Sharpe*, the *London* agents of his firm, acted as his solicitors in the action, and made profit costs. They credited the Defendant's firm with a proportion of these profit costs, and the Defendant claimed to be entitled to share therein.

During the proceedings in this action a receiver was appointed, and the Defendants' firm, by their agents Messrs. *Elwes & Sharpe*, acted as solicitors of such receiver, and received part of the profit costs allowed to the receiver on taxation, amounting to £15 6*s.* 1*d.*, a share of which was claimed by the Defendant *Elwes*. The Defendant also claimed a share of certain profit costs paid to the firm by lessees and others in respect of leases and agreements for leases of certain hereditaments forming part of the estate granted by him, and prepared and carried out by him or his firm.

When the action came on for further consideration, an order was made for taxation of the costs of the Plaintiff and Defendant as between solicitor and client, including in the costs of the Defendant any charges and expenses properly incurred by him as trustee of the will beyond the costs of the action; and it having been suggested that the Defendant had already received profit costs, the Taxing Master was directed to inquire into the matter.

The Defendant then carried in his costs, including therein the various profit costs mentioned above, and the Taxing Master in his certificate, at the request of the parties, stated for the opinion of the Court the circumstances connected with such profit costs, to the effect above appearing.

The present summons was taken out on behalf of the Plaintiff asking that a sum of money might be raised out of the estate for the payment of the costs, and that the profit costs so claimed by the Defendant as being payable to him or his firm might be disallowed.

Hastings, Q.C., and *Swinfen Eady*, in support of the summons:—

No solicitor-trustee can charge more than his costs out of pocket, for the rule is, that a trustee shall not make a profit out of his trust, otherwise his interest would be constantly in conflict with

his duty, and the rule applies not only to profit costs made by the trustee-solicitor himself, but also to his share of profit costs made by his partner or firm: *Clack* v. *Carlon* (1).

Kekewich, Q.C., and *Bardswell*, for the Defendant:—

The rule that a solicitor-trustee is not entitled to charge profit costs is confined to cases where he acts as solicitor for himself alone, and thus employs himself; and it does not extend to cases where he is employed by and acts for a body of trustees of whom he himself is one, although the employment may arise incidentally out of his being a trustee: *Cradock* v. *Piper* (2). At all events, profits so remote as those derived from the steward's fees payable to a steward who happened to be the partner of the trustee-solicitor cannot fall within the rule: *Whitney* v. *Smith* (3). [They also referred to *Lincoln* v. *Windsor* (4); *Broughton* v. *Broughton* (5), and *New* v. *Jones* (6).]

Hastings, in reply:—

The decision in *Cradock* v. *Piper* is limited to costs incurred in a suit, and *Whitney* v. *Smith* was a case in which the solicitor-trustee acted for a third party in an outside transaction. The other cases we claim as authorities in our favour.

KAY, J.:—

The rule is a very good one, and one which must be carefully observed, that a trustee shall make no profit by his trust. The rule is not merely that he shall make no profit out of the trust estate, but a very much wider one than that. And I do not know that it is anywhere better expressed than in the language I am going to read of Lord *Cranworth* in the case of *Broughton* v. *Broughton* (7): "The rule applicable to the subject has been treated at the Bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place

(1) 9 W. R. 568.
(2) 1 Mac. & G. 664.
(3) Law Rep. 4 Ch. 513.
(4) 9 Hare, 158.
(5) 5 D. M. & G. 160.
(6) 1 Mac. & G. 668, n.; S. C. 1 H. & T. 632, n.
(7) 5 D. M. & G. 164.

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himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore, is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only question is how far the circumstances of the present case take it out of this rule."

I must apply that rule to the several instances brought before me, which are not cases of a large amount, and as to which I may say at once, as far as I can see, there is no gross impropriety or anything of that kind in the matter. I have to see which of these charges come within the rule. Now, first of all, there is a charge of £16 19*s.* 2*d.*, that arises in this way. [His Lordship stated the facts with relation to this charge, and continued:—] Beyond all question this comes within the principle enunciated in the words I have read from Lord *Cranworth's* judgment. These are costs which Mr. *Elwes*, as one of the trustees, was bound to check and moderate, and the *cestui que trust* was entitled to have not merely the check afforded by the power of taxing the costs, but also the check afforded by the vigilance of the trustee, taking care to see that no more costs were incurred than were absolutely necessary.

But then it is said there is a decision of Lord *Cottenham* in *Cradock* v. *Piper* (1) which entitles the trustee to those costs,

(1) 1 Mac. & G. 664.

and for this reason, that his firm was acting not merely for him alone but for his co-trustee also. He was not the sole trustee, he had a co-trustee, and it is stated there was litigation pending and that a distinction has been made by the decision in *Cradock* v. *Piper* (1) in a case of that kind where the solicitor-trustee or his firm acts for himself and a co-trustee, and the costs are costs of litigation. In the case of *Cradock* v. *Piper* they were the costs of an administration action. *Cradock* v. *Piper* has been treated in this way. It is absolutely inconsistent with the previous decision of Lord *Langdale* in *Bainbrigge* v. *Blair* (2). It was limited by Vice-Chancellor *Turner* in *Lincoln* v. *Windsor* (3) to costs in a suit, and it was there held that it did not apply to the costs of business of administration done out of Court. In *Broughton* v. *Broughton* (4), the case I have just referred to, Lord *Cranworth* says this (5): "It is in the first place sought to take this case out of the rule on the authority of *Cradock* v. *Piper*, and here I must own, speaking with all deference and not meaning to decide anything on the point, that I cannot see any distinction between costs incurred in a suit and costs incurred in administering an estate without a suit; the danger may possibly be less in the former case than in the latter, but the principle is the same. As every trustee is bound to protect the estate against improper charges, there must also exist the same difficulty in principle in his acting for himself and others, as in acting for himself alone; and as to this, when the point was mentioned in the House of Lords, I felt the same difficulty in understanding the difference as was felt by the noble Lord whose remarks have been quoted." That was a reference to a case of *Manson* v. *Baily* (6) in the House of Lords, in which Lord *Cranworth* and also Lord *Brougham* somewhat criticised the decision in *Cradock* v. *Piper*.

He continues, in the judgment I was reading: "In *Cradock* v. *Piper*, however, the general rule might have been probably safely relaxed; and where the question related to charges incurred in a suit, there would be considerably less danger in relaxing it where the parties had been made defendants, than where they had filled

(1) 1 Mac. & G. 664.
(2) 8 Beav. 588.
(3) 9 Hare, 158.
(4) 5 D. M. & G. 160.
(5) Ibid. 164.
(6) Unreported.

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the character of plaintiffs. If, therefore, the circumstances of the case before me had brought it within the same class, I should have felt myself bound to follow the decision of Lord *Cottenham*, which, however, appears to me to overrule the previous decision of the Master of the Rolls in *Bainbrigge* v. *Blair* (1)." And he goes on to say that the circumstances are not similar.

In this state of things what is the Court to do? Obviously I cannot overrule the decision of Lord *Cottenham* in *Cradock* v. *Piper* (2), therefore, if this case comes within that decision I must follow *Cradock* v. *Piper*. I most emphatically say I agree with the reasoning of Lord *Cranworth*, and I cannot see any distinction on earth between the case of costs incurred in a suit and the case of costs incurred in administering an estate which ought to make a difference in the application of the rule. Does this case, then, come within *Cradock* v. *Piper*? Certainly it was not the case of a suit, certainly not the case of active litigation: it was merely a case in which an application was made by summons to the Court to fix the amount of maintenance. Can I say that this comes so exactly within the case of *Cradock* v. *Piper* that I am bound to follow a decision which, as the authorities I have referred to shew, has been exceedingly discredited and ought only to be followed where the circumstances are identical? In my opinion it does not, and therefore I feel at liberty to follow the rule laid down by Lord *Cranworth*, and to say these costs ought not to be paid out of the estate to the firm in which Mr. *Elwes*, the trustee, is a partner.

Then come a number of costs which were incurred after, by the death of his co-trustee, he became the sole trustee. Some of these were costs incurred in the action which was afterwards brought to administer the estate, the solicitors on the record being the firm of *Elwes & Sharpe*, who were a *London* firm in which he was not a partner, but it quite plainly appears that they acted upon agency terms, and shared the profit costs with the firm in which Mr. *Elwes* was a partner.

The question is, how far he can retain against the trust estate those costs which he got under a certain understanding (it was said there was no absolute agreement) between himself and the

(1) 8 Beav. 588. (2) 1 Mac. & G. 664.

firm of *Elwes & Sharpe*. It is said there that was no agreement and that this was a gratuity. Let us try it on that footing: can a trustee accept a gratuity from a firm of solicitors acting in an action for himself as solicitors to the trust? To me it seems perfectly ludicrous. The attempt to make this out not to have been paid by way of arrangement, makes the case of the trustee worse, so that it would be hopeless for him to maintain the payment to himself on any footing of that kind. Therefore I am bound to disallow all these costs which he gets by way of agreement, understanding, or gratuity.

The next item is a charge of £15 6*s.* 1*d.* in respect of profit costs received by the Defendant's firm for acting through their agents as solicitors for the receiver. Are they entitled to retain those against the estate? Now I test it by applying again the principle of the rule, What was the duty of the trustee in respect of the receiver's costs? Besides the power which the *cestui que trust* had of having the costs taxed, the trustee was bound to give the *cestui que trust* the additional protection of his care and vigilance in checking them in order to prevent any unnecessary costs being incurred. Can it be possibly said, when he acts himself as solicitor to the receiver, that he does not put himself in a position in which his duty and interest conflict? I have no reason to say that there was anything dishonest. For anything I know those costs may even have been less than would have been incurred if a different solicitor had been employed, but I cannot help seeing, when the trustee puts himself in the position of acting for the receiver, he puts himself in a position in which his duty and interest conflict. His interest would be to make the costs as large as possible, his duty to make them as small as possible. The rule must apply, and he cannot have these profit costs out of the trust estate.

Then comes a very different class indeed, to which, of course, different considerations apply. The class of costs with which I have to deal with now are costs not paid out of the estate, and I may treat them as being of two kinds. One is this: after the death of Mr. *Lawton*, the Defendant's partner Mr. *Turner* was appointed steward of the manor of *Wivenhoe*, which was part of this trust estate, and as such steward the partner received a fee

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when there was an admission, when there was an enfranchisement, or when there was any manorial business. Now, he does not receive those fees from the estate, but from copyhold tenants. Take this case: A copyhold tenant wants to enfranchise, he comes to the steward and says, "I desire to enfranchise my copyhold." Then the matter is carried out, and on that enfranchisement the steward has a right to charge certain fees as a profit to himself in the nature of profit costs as remuneration for his trouble in the matter. The fees received in that way by the partner were, it is admitted, carried to the credit of the firm, and it is just the same as if the trustee himself received them. Now, where is the difference between the trustee appointing his partner steward, letting his partner receive the fees and sharing them with him, and the trustee appointing himself steward and taking the fees himself and putting them into his own pocket? For the purpose of the rule there is no difference in the world. He is exactly in the position in which his interest and duty conflict. His duty is to see that all the payments which are required to be made by persons who deal with the steward for enfranchisement and otherwise are as reasonable as possible, otherwise the estate may lose a great deal. For example, the tenant may want to enfranchise on a large scale, but if the fees are made exorbitantly high, the tenant may shrink from enfranchising, and the estate may lose. There would be a great many instances in which the duty of the trustee to keep down the fees of the steward within reasonable limits would conflict with his interest if he was the steward: or if (which for this purpose is the same thing) his partner was steward, in which case his interest would be to make the fees as high as he could. There, again, it seems to me is a case where the duty and interest of the trustee are in conflict, and I cannot see how he can be allowed to retain as against the trust estate fees so obtained. I tried it during the argument by an instance. Suppose a copyhold tenant came to the steward and said, "I want to enfranchise my copyhold, and if you give me every facility for doing that I will give you £50," and the steward was either the trustee himself, or, as in this case, the partner of the trustee who shared all the emoluments that he got. If the steward was the trustee

himself, could the trustee possibly say, "I will put into my pocket that £50"? The answer is too obvious. The probability would be that the enfranchisement would be made on easier terms by reason of the £50 being given, so that practically the £50 would be coming out of the estate. Suppose instead of saying "I will give you £50" the copyhold tenant said, "If you will enfranchise this estate for me on reasonable or moderate terms I will pay you a very large fee," what is the difference? The fees, to some extent, would come practically out of the trust estate. That could never be allowed by a trustee as against the *cestui que trust.*

I do not, of course, suggest—that must be thoroughly understood—that anything of the kind was done, or even dreamt of, in this case. I have no reason to suppose these gentlemen acted otherwise than fairly and honestly. I put these cases to shew that the rule must apply to a case of that kind: otherwise you would be letting in all the mischief that a rule of this kind is intended to prevent. It seems to me that I cannot allow him to keep fees obtained by the partner as steward which he was to share as against the trust estate. He must account for those fees.

Now, the next, and, I think, the only other matter is precisely analogous. It is also a case in which the profit costs obtained by the trustee do not come directly out of the trust estate. It is a case in which the trustee grants leases or agreements for leases and gets from the lessees payment of the profit costs of these transactions. He acts in fact as solicitor for himself, or his firm as solicitors for him, in preparing and granting these leases, and he or they obtain payment for those leases from the lessees. I will not repeat what I have said. Every word I have said about the fees obtained by the steward applies precisely to that kind of case. It is obvious that if these costs were made exorbitant they might either injure the estate by preventing leases being taken, or the leases might be granted, and would probably be granted, upon terms less advantageous to the estate by reason of the heavy costs, which the lessee, if he were a prudent man, would take into consideration; and in one way or the other the estate might be very much injured, or practically these costs

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might come out of the estate. Therefore, that seems to me to be a case in which the trustee again is placing himself in the position where duty and interest conflict, and to which the rule applies which would prevent his retaining those costs.

Now, I have not been furnished with a single authority supposed to support the contention that the trustee could retain for himself costs of this kind except the case of *Whitney* v. *Smith* (1). The case of *Whitney* v. *Smith* shews plainly he could not. That was a case in which a trustee, who was a solicitor, lent monies belonging to the trust estate to a person on mortgage, and afterwards, having by that means been introduced to the mortgagor, he acted as solicitor for him in other matters relating to that mortgaged estate. I understand it was a building estate. The mortgagor continued in possession and, having thus been introduced to the trustee's solicitor, he employed him as his solicitor in dealing with that estate afterwards for third parties ; and it was attempted to extend this rule to that case, and to say any profit costs which the solicitor to the trustees had made in his subsequent dealings with the mortgagor he must account for to the trust estate. It was obvious that was extending the rule far beyond anything asked for in this case before me, and extending the rule to a proceeding which the Court held, and as it seems to me, if I may say so with great respect, rightly held, to be too remote and quite outside and beyond the mischief which the rule was intended and designed to prevent. Therefore, it seems to me that case does not determine the case I have before me now, and I must disallow these profit costs in all the items I have mentioned. As to the costs of this matter, I do not think it is a case for costs. I think there should be no costs of this inquiry on either side.

Kekewich, Q.C. :—

Does your Lordship decide that the Defendant's share of the profit costs not payable out of the estate must be disallowed, or that all the profit costs of the Defendant's firm of this class must be disallowed ?

(1) Law Rep. 4 Ch. 513.

KAY, J.:—

I have no means of separating these profit costs into shares, nor could this be done without an account being taken. The whole profit costs of the Defendant's firm must be disallowed upon the principle of *Broughton* v. *Broughton* (1).

Solicitors: *A. W. Digby; Elwes & Sharpe.*

(1) 5 D. M. & G. 160.

W. W. K.

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1886
May 22;
June 5.

In rè STAINES.
STAINES *v.* STAINES.

[1886 S. 462.]

Order for Sale of Real Estate—"Cause or matter relating to real estate"—Rules of Supreme Court, 1883, *Order* LI., *r.* 1.

An action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate and of the rents and profits of the real estate received by the Defendant. The action came on for hearing on motion for judgment, and the Court was asked under rule 1 of Order LI. to make an order for the sale of the real estate. The Defendant did not object:—

Held, that this was not "a cause or matter relating to real estate" within the meaning of the rule, and that the Court could not order a sale under that rule.

But, upon a summons under the *Settled Land Act*, a sale was ordered.

THIS action was brought for the administration of the real and personal estate of *J. H. Staines*, who died intestate on the 18th of March, 1882. On the 17th of April, 1882, administration of the personal estate was granted to his widow. The Plaintiff was the intestate's eldest son and heir-at-law; he was an infant, and sued by a next friend; the Defendant was the administratrix. The writ claimed administration of the real and personal estate, and also an account of the rents and profits of the real estate received by the Defendant; the appointment of a receiver of the rents and profits; and the appointment of guardians of the Plaintiff.

By the statement of claim the Plaintiff alleged that the Defendant, on the death of the intestate, entered into possession of, and had since continued to collect and receive, the rents and profits of the real estate of the intestate (which consisted of some freehold houses), and that she had refused to account for either the personal estate or the rents and profits of the real estate. The Plaintiff also alleged that the real estate was subject to a mortgage to a building society, the mortgage-money being payable by monthly instalments; that some of the instalments were in arrear; and that the building society were threatening to exercise their power of sale under their mortgage.

The Plaintiff claimed an account of the personal estate of the intestate, and that in default thereof the personal estate might be administered by the Court, and that the real estate might be sold.

By her statement of defence the Defendant said that the interest and instalments of principal due on the mortgage exceeded the rents of the real estate, and that she was willing that the real estate should be sold.

The action now came on to be heard upon motion for judgment. The notice of motion asked for an order for the sale of the real estate, and the payment of the purchase-money into Court, and the application of the same in the payment of incumbrances; and for an account of the rents and profits of the real estate received by the Defendant, and of the application of the share thereof belonging to the Plaintiff.

There was evidence that the Plaintiff was being maintained by a friend of his father, who was a stranger in blood.

Baines, for the Plaintiff:—

The Court has power to order a sale of the real estate under rule 1 of Order LI. This is "a cause or matter relating to real estate."

R. F. Norton, for the Defendant, did not object to a sale.

NORTH, J.:—

I do not think this is "a cause or matter relating to real estate" within the meaning of the rule. It is really an action for the recovery of the rents and profits. The Court has no power to sell an infant's real estate merely because it thinks it would be for his benefit that it should be sold.

Baines:—

An order for sale might be made under the *Settled Land Act*.

NORTH, J.:—

I will give you leave to issue a summons for that purpose.

June 5. A summons having been issued under the *Settled*

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Land Act asking for a sale of the land, as had previously been done in a like case, *Pickard* v. *Wheater* (1), before *Pearson*, J.

NORTH, J., made an order for sale.

Solicitor for Plaintiff: *Jackson W. Smart*, agent for *J. C. Bulman, Leicester.*

Solicitor for Defendant: *W. J. Mitton*, agent for *J. & S. Harris, Leicester.*

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NORTH, J. 1886 *June* 8.

In re COMMERCIAL BANK OF SOUTH AUSTRALIA.

Company—Winding-up—Jurisdiction—Foreign Company with Branch Office in England.

A banking company, incorporated and carrying on business in *Australia*, had a branch office in *London*, but was not registered in *England*. The company had English creditors, and assets in *England*. Two petitions were presented to wind up the company, which had stopped payment, and on the hearing of the petitions an order was made appointing a provisional liquidator, and the further hearing was ordered to stand over for a time. The powers of the provisional liquidator were limited to the taking possession of, collecting and protecting the assets of the company in *England*, with liberty to apply in Chambers.

When the petitions came on again to be heard it appeared that a petition to wind up the company had been meanwhile presented in *Australia*, and a provisional liquidator had been appointed there, but it was not proved that a winding-up order had been made:—

Held, that there was jurisdiction at the time when the petitions were presented to make an order to wind up the company, and that the jurisdiction could not be affected by subsequent proceedings in *Australia*.

A winding-up order was accordingly made, the order appointing the provisional liquidator being continued, with the same restrictions on his powers, the Judge expressing an opinion that the winding-up in this Court would be ancillary to a winding-up in *Australia*, and that, if the circumstances remained the same, the powers of the official liquidator when appointed ought to be restricted in the same way.

TWO petitions were presented for the winding-up of this company; the first on the 11th of March, 1886, by Lord *Ardilaun*, who was a creditor for a large amount; the second on the 12th of March, 1886, by *J. D. Suhling*, who was the holder of 200 shares

(1) 31 Ch. D. 247.

in the company. The company had carried on the business of bankers in *Australia* and in *London*, the head office being in *Australia*, and there being a branch office in *London*. The company was incorporated in *Australia* in 1878, by a private Act of the South Australian Parliament, with limited liability. The subscribed capital was £500,000 in shares of £5 each, of which £4 per share had been paid. By virtue of the Act of incorporation the shareholders were liable, in the event of a winding-up, to contribute to the assets of the company, in addition to the £5 per share subscribed, a further sum not exceeding £10 per share. The company was not registered in *England*. In February, 1886, the company suspended payment both in *Australia* and in *London*. There were a considerable number of creditors, and assets to a large amount, in *England*. The petitions both alleged that the company was commercially insolvent, though the assets, including the further sums which the shareholders would be liable to contribute in the event of a winding-up, would be more than sufficient to pay all its debts. Some of the shareholders were resident in *England*.

On the 16th of March, on the application of the second Petitioner, Mr. Justice *Pearson* appointed *R. Mackay*, an accountant in *London*, and *T. G. Pleydell*, the manager of the *London* branch of the company, provisional official liquidators of the company. The two petitions came on to be heard together, and on the 14th of April Mr. Justice *Pearson*, on the undertaking of the company by their counsel not to consent to a winding-up order on any other petition, and not to wind up voluntarily, and to give notice to the respective Petitioners of any other petition for winding-up the company which might be served upon them, and, in the event of any such other petition being served on them, to consent to the two petitions being restored to the paper, and that the application for a winding-up order by them might be renewed, in the same manner as if the petitions had not been ordered to stand over, ordered that both the petitions should stand over until the last petition day in the Easter sittings, without prejudice to any question. And it was further ordered that the order of the 16th of March, appointing *Mackay* and *Pleydell* provisional liquidators, so far as regarded the appointment of *Mackay*, should be discharged

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as from the 30th of March, and that *Pleydell* should be continued provisionally official liquidator of the company. And the Court did thereby limit and restrict the powers of *Pleydell* as such provisional liquidator to the following acts, viz., to take possession of, collect, and protect the assets of the company, but not to distribute or part with the same until further order, but with liberty to apply in Chambers as he might be advised.

The two petitions now came on again for hearing. In the meantime a petition for the winding-up of the company had been presented in *Australia*, and an order had been made on it for the appointment of provisional liquidators. It was stated that a winding-up order had also been made, but this, in the opinion of the Court, was not sufficiently proved.

Cozens-Hardy, Q.C., and *C. G. Hyde*, for the first Petitioner:—

The Court has jurisdiction to make a winding-up order, and, if it is not made, there will be nothing to protect the assets in this country from executions by creditors. Mr. Justice *Pearson* has already in effect decided that there is jurisdiction.

Napier Higgins, Q.C., and *F. B. Palmer*, for the second Petitioner:—

Admitting the jurisdiction to make a winding-up order, it is a question of convenience. It is desirable to save unnecessary expense, and it would be better to adopt the course which was suggested by Mr. Justice *Kay* in *In re Matheson Brothers* (1), viz., appoint a provisional liquidator to protect the English assets. There is no case in which concurrent winding-up orders have been made by different jurisdictions; such a course might lead to great inconvenience and embarrassment. The *Companies Act* which is in force in *South Australia* is substantially the same as the *Companies Acts* in this country, and a winding-up order made there would protect everyone. An order here could only affect the assets here.

Northmore Lawrence; and *Giffard*, Q.C., and *Theobald;* for creditors, supported the first petition.

(1) 27 Ch. D. 225.

Cookson, Q.C., and *Stock*, for the company :—

There is no precedent for making a winding-up order here after an order has been made in another country.

[NORTH, J. :—That could not affect the jurisdiction.]

It affects the question of convenience.

Gatey, for other creditors.

Cozens-Hardy, in reply :—

The question of jurisdiction is already decided by the order appointing provisional liquidators, and *In re Commercial Bank of India* (1) and *In re Matheson Brothers* (2) are authorities to the same effect, and as to convenience, why should the English creditors have to prove their debts in *Australia?* The common winding-up order should be made, and, when the question of dividend arises, the Court will have regard to the proceedings in *Australia*. In an action to administer the estate of a person who had died abroad the Court would give the ordinary administration judgment, but would, in administering the assets, have regard to proceedings in the Court of the domicil. It is absolutely necessary for the protection of the English creditors that a winding-up order should be made; they cannot otherwise prove their debts. There is no reason for giving any special directions now.

Napier Higgins, in reply, as to the second petition :—

The presentation of the second petition was fully justified.

NORTH, J. :—

I think a winding-up order ought to be made. The principal office of the company is in *Australia*, but they have carried on a considerable business in this country, where they have a large number of creditors and a large amount of assets. Undoubtedly the company are insolvent in this sense, that they are unable any longer to carry on their business, and have been compelled to close their doors. Their assets consist in part of the liability of the shareholders to contribute an additional sum of 200 per cent.

(1) Law Rep. 6 Eq. 617. (2) 27 Ch. D. 225.

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in respect of their shares for the payment of creditors in the event of a winding-up. I understand the view of Mr. *Pleydell* to be this, that, if all the assets were called up, there would be more than sufficient to pay the creditors in full. The question is whether the English creditors ought to be left to recover their debts in a winding-up of the company in *Australia*, their debts having been contracted here, and there being a large amount of assets here. Two winding-up petitions have been presented here, and all I know about the proceedings in *Australia* is, that an order has been made for the appointment of provisional liquidators. I have no proper proof that a winding-up order has been made there. At any rate, if it has been made, it was not made till at least a month after the petitions were presented here. I think, therefore, that the English creditors are entitled to have a winding-up order made by this Court. I do not think it would be right to insert any special directions in the order; this is not the proper time for giving such directions. But I will say this, that I think the winding-up here will be ancillary to a winding-up in *Australia*, and, if I have the control of the proceedings here, I will take care that there shall be no conflict between the two Courts, and I shall have regard to the interests of all the creditors and all the contributories, and shall endeavour to keep down the expenses of the winding-up so far as is possible. I think it clear that there is jurisdiction to make a winding-up order; the cases which have been cited shew that there is jurisdiction, and the order of Mr. Justice *Pearson* assumes that it exists. He could not have appointed provisional liquidators, unless he had jurisdiction to make a winding-up order. It is said that the circumstances have been altered since his order, by reason of the petition which has been presented and the order which has been made in *Australia*. That may affect the course of the winding-up, but it cannot affect the jurisdiction. If it could, then, if the laws of the two countries are the same, the existence of the order which was made here would equally have prevented the making of the order there. I do not think that I ought to insert any special directions in the order. But I think that the liquidator ought not to act without the special directions of the Judge in Chambers, except for the purpose of getting in the English assets and settling a list of

the English creditors. I shall continue the existing order appointing the provisional liquidator, and when an official liquidator is appointed I shall, unless the circumstances have changed, give similar directions to him.

With regard to the costs of the petitions, I think the second petition was to some extent beneficial to the creditors, because the order appointing the provisional liquidators was made on the application of that Petitioner, and he would have had no *locus standi* unless he had presented a petition. Therefore, I think he is entitled to his costs. The winding-up order will be made on the first petition, with costs in the usual way, and further proceedings on the second petition will be stayed.

Solicitor for first Petitioner: *Edwin Andrew.*
Solicitors for second Petitioner: *Munns & Longden.*
Solicitors for Company and Creditors: *Hancock, Sharp & Hales.*
Solicitors for other Creditors: *Donnithorne & Ewer*; *Johnston, Farquhar & Leech.*

W. L. C.

In re COWIN.
COWIN *v.* GRAVETT.

[1886 C. 270.]

Title Deeds—Production—Trustee and Cestui que Trust—Trust for Sale.

Considered. BUTT KELSON [1952] 1 Ch. 1

Primâ facie, and in the absence of any special circumstances, a *cestui que trust*, even though he be only interested in the proceeds of the sale of land, is entitled to the production and inspection of all title deeds and other documents relating to the trust estate which are in the possession of the trustees.

One *cestui que trust* can enforce this right against the trustees, without bringing before the Court the other persons beneficially interested in the property when they have no higher right than himself.

ORIGINATING SUMMONS by one of the *cestuis que trust* under a will, as Plaintiff, against the trustees, as Defendants, asking for a declaration "whether the Plaintiff is or is not entitled as of right, by himself, his solicitors or agents, at all reasonable times and at his own expense, to inspect all the deeds,

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papers, and documents relating to the property subject to the trusts of the will, and held by the Defendants as trustees of the will, including all muniments of title to the real or copyhold estates subject to the trusts of the will, and that, if not so entitled, it may be declared that the Defendants as trustees are under the circumstances justified in permitting the Plaintiff by his solicitor to examine the same, the tenant for life consenting thereto."

The testator, *Matthew Cowin*, by his will, dated the 12th of December, 1854, gave, devised, and bequeathed all his real and personal estate and effects to trustees upon the trusts thereinafter declared concerning the same. And he authorized and requested his trustees, while any son of his was under age, or any daughter of his was under age and unmarried, or for such shorter period as the trustees should think fit, to carry on his farming business, with such powers as therein mentioned, and to use his real and personal property therein, as if they were absolute owners thereof. And, subject to the foregoing directions and powers, he directed that his personal estate should be sold, got in, and converted into money, and, after payment of all costs, and his debts and funeral and testamentary expenses, he directed the surplus of the proceeds of his personal estate, and of such real estate as should be sold under the power thereinafter contained, to be invested by his trustees in their names as therein mentioned. And he declared that his trustees might sell his real estate or other trust property at any time or times, in any manner, and upon any terms, in their absolute discretion, as if they were absolute beneficial owners of all his real and personal estate. And he declared that, for the purpose of enjoyment and transmission under the trusts thereinafter contained, his real estate should be considered as money from the time of his decease. And he directed that the rents and annual income of all his real and personal estate (including the profits of his business while the same was continued) should be paid to or received by his wife during her widowhood, to be by her applied for her maintenance and the maintenance and education of his children during their respective minorities. And, from and immediately after her decease or marriage again, he gave and bequeathed the whole of his

trust property (including the proceeds of his real estate, which he directed should be sold by his trustees before any distribution) unto such child or children of his living at his decease, and such child or children of any child or children of his dead in his lifetime, as should survive him and attain the age of twenty-one, or being a daughter or daughters should marry, and, if more than one, in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased child of his should take only the share which such deceased child would have taken if living.

The testator died on the 13th of December, 1872.

Eight children of the testator (of whom the Plaintiff was one), survived him and attained vested interests under his will. There were no children of children of the testator who died in his lifetime. When the summons was issued the testator's widow was still living, and she had not married again.

The Plaintiff desired to raise money by a mortgage of his reversionary interest under the will, and his solicitors, on his behalf, applied to the Defendants' solicitors to be allowed to inspect the title-deeds of the trust property, and their managing clerk attended at the office of the Defendants' solicitors for the purpose of inspecting the deeds.

The Defendants' solicitors, however, refused to allow the clerk to inspect any documents prior to the probate of the testator's will. The refusal being persisted in, the present summons was issued.

One of the Defendants' solicitors made an affidavit in which he said that six of the testator's children had assigned their reversionary interests under the will to other persons. He said that he refused to allow the clerk of the Plaintiff's solicitors to inspect the deeds "upon the ground that I could not disclose the title to properties which the Defendants as trustees claimed to hold, and which properties would hereafter be offered for sale by auction in pursuance of the trusts of the will and under such conditions as may be necessary, and upon the further ground that such an investigation of the title as is claimed may shew that the testator had no title, or a defective title, to all or some of the trust properties, and thereby a future sale by the trustees may be

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rendered difficult, and the *cestuis que trust* seriously prejudiced. The title deeds and documents relating to the several properties have not been investigated or perused by me nor by my partner, nor by any other solicitor, as I believe, on behalf of the Defendants, and without such an investigation I am unable to say whether the Defendants have a good title thereto, or what defects in the several titles may exist. Some of the other persons beneficially interested in the proceeds to arise from the sale of the real and personal estate of the testator, and claiming by assignment from others of the children of the testator, do not consent to the production of the title-deeds to the Plaintiff or his solicitors. The Defendants submit to act as the Court may direct."

Cozens-Hardy, Q.C., *Phillpotts*, and *W. Whately*, for the Plaintiff:—

A *cestui que trust*, being in equity the true owner of the trust property, is entitled to see the deeds relating to his own property: *Lewin* on Trusts (1); *Simpson* v. *Bathurst* (2); *Davis* v. *Earl of Dysart* (3).

Napier Higgins, Q.C., and *H. Terrell*, for the Defendants:—

The trustees are trustees for the tenant for life and all the remaindermen, and some of the other beneficiaries object to the production of the deeds for the purpose for which the Plaintiff wants them. There is a risk of disclosing some flaw in the title to the real estate. Most titles have some flaw, and the value of the property may be depreciated when it comes to be sold. One beneficiary is not entitled to the production of title-deeds without the consent of the others. The Plaintiff is only entitled to a share of the proceeds of the sale of the estate. The cases cited relate to persons entitled to a legal estate in land. No doubt, the owner of a legal vested remainder in land is, as against the tenant for life, *primâ facie* entitled to inspect the title-deeds, but a contingent remainderman is not: *Noel* v. *Ward* (4); *Allwood* v. *Heywood* (5).

(1) 8th Ed. pp. 680, 975.
(2) Law Rep. 5 Ch. 193, 202.
(3) 20 Beav. 405.
(4) 1 Madd. 322, 329.
(5) 11 W. R. 291.

[NORTH, J. referred to *Davidson's* Conveyancing (1).]

Even in the case of legal estates the Court has a discretion as to ordering production: *Davis* v. *Earl of Dysart* (2).

[NORTH, J., referred to *Warren* v. *Rudall* (3).

Cozens-Hardy:—The rule as then laid down, was said by *Jessel*, M.R., in *Leathes* v. *Leathes* (4), not to be accurately stated.]

As to the right of a *cestui que trust* to compel production by his trustee of deeds relating to the trust property there is a dearth of authority.

[NORTH, J., referred to *Pennell* v. *Earl of Dysart* (5)].

The rule as to legal owners will be applied as between an equitable tenant for life and an equitable remainderman to a reasonable extent. The trustee is entitled to the custody of the deeds for the benefit of all the persons interested in the property, and it must depend upon the nature of the trust whether any individual *cestui que trust* is entitled to production of the deeds. No *cestui que trust* can require the trustee to do anything which would be adverse to the interests of the others or injurious to the trust estate. The trustee must discharge his duty fairly to all the *cestuis que trust*. None of the cases referred to by Mr. *Lewin* establish the right which the Plaintiff claims. In *Simpson* v. *Bathurst* (6) there was nothing more than a *dictum*. *Gough* v. *Offley* (7) has really no bearing on the point. It related to the title deeds of property on the security of which trust funds had been invested. Many of the cases cited by Mr. *Lewin* relate to opinions of counsel and other documents which had been paid for out of the trust funds. It is enough that the production may possibly injure the other *cestuis que trust*. At any rate, production cannot be ordered in the absence of the other *cestuis que trust*: *Bugden* v. *Tylee* (8).

The Plaintiff cannot be entitled to production as of right; the Court will have regard to the interests of all the beneficiaries:

(1) 5th Ed. vol. i. pp. 490, 491.
(2) 20 Beav. 405.
(3) 1 J. & H. 1.
(4) 5 Ch. D. 221.
(5) 27 Beav. 542.
(6) Law Rep. 5 Ch. 202.
(7) 5 De G. & Sm. 653.
(8) 21 Beav. 545.

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Lord Lempster v. *Lord Pomfret* (1); *Ex parte Rogers* (2). The trustees have an active trust to perform before the Plaintiff will be entitled to anything. The Plaintiff can never become entitled under the will to the land itself, and he stands in a position very similar to that of a contingent remainderman. He will not ultimately have any right to the custody of the deeds. If the trustees were to allow defects in the title to become known they would be responsible in damages to the *cestuis que trust* if the sale of the property was consequently depreciated: *Taylor* v. *Blacklow* (3). Suppose the testator had originally no title to the property. A possessory title might have been almost acquired by lapse of time, and the production of the deeds might reveal the defect of title, and enable the real owner to oust the trustees.

Cozens-Hardy, in reply:—

The Plaintiff has a *primâ facie* right to production of the deeds. There is no evidence of any defect in the title, or of any other special circumstance which can justify the trustees in withholding the deeds.

NORTH, J.:—

I think the Plaintiff is right in his contention. [His Lordship stated the provisions of the testator's will and referred to affidavits of the Plaintiff's solicitor and the Defendants' solicitor, and continued:—] The case is a very simple one. The Plaintiff is entitled in remainder to one-eighth of the trust property, subject to the interest given to the testator's widow during her widowhood. The property consists of real and personal estate. It is subject to a power of sale by the trustees now, and to a trust for sale in the future. Unless the persons interested should elect to take the property in its actual condition, it will have to be converted into money on the death or marriage again of the widow. The Plaintiff is one of the persons interested in the proceeds of sale. The first question is, whether the Plaintiff is *primâ facie* entitled to inspect the title deeds and other documents relating to

(1) 1 Amb. 154. (2) 26 Ch. D. 31.
(3) 3 Bing. N. C. 235.

the real estate; and, if he is, the question will arise whether any good reason has been shewn for depriving him of that *primâ facie* right. In my opinion the Plaintiff has a *primâ facie* right to inspect the deeds, and for this reason, that *cestuis que trust* are the beneficial owners of the trust property. I think there is clear authority for so holding. The proposition is thus stated in *Lewin* on Trusts (1): "All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners," and three of the cases which Mr. *Lewin* cites are strong authorities in support of that proposition. The first is *Gough* v. *Offley* (2). That was a suit for the administration of a testator's estate, and the defendants, the trustees and executors, admitted by their answer the possession of the title deeds of various properties on the security of which they had properly invested the testator's assets, but they alleged that the mortgagors objected to the production of the deeds, and that they would prefer to pay off the mortgage debts; and the defendants objected to produce the deeds in the absence of the mortgagors. Upon a motion for production it was held by Vice-Chancellor *Parker* that the deeds must be produced. The Vice-Chancellor said (3): "The plaintiffs have a right to see all the securities. As to the mortgagors, when they parted with their title deeds to the defendants they subjected themselves to all the inconveniences consequent upon that. The case does not come within any of the exceptions to the ordinary rule. There must be the common order for production," *i.e.*, the common order for the production by a trustee of the documents relating to the trust property. The next case is *Bugden* v. *Tylee* (4). There "*A. B.* settled property on trust for the plaintiff and others, but he reserved a power of defeating it. The plaintiff alleged that the trusts had been partially defeated by a subsequent deed, and called upon the trustee to produce the trust deed. The trustee in his answer stated, that the plaintiff's interest had been totally defeated by the subsequent deed, which he did not object to produce, but he said that *A. B.* (who was not a party to the suit) objected to the production." Lord *Romilly*,

(1) 8th Ed. p. 975.
(2) 5 De G. & Sm. 653.
(3) 5 De G. & Sm. 655.
(4) 21 Beav. 545.

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M.R., said (1): "I am of opinion, that the plaintiffs are entitled to see the deed, to ascertain whether the statement made of it by the trustee is correct and accurate. Undoubtedly it may turn out to be such as is stated; but a person, originally a *cestui que trust*, and taking a benefit, and interest under a deed, and who alleges that it has been partially and not wholly exhausted by a subsequent deed, is entitled to see the original deed creating the trust, which is stated by him to be partially, and by the trustee wholly exhausted, by a subsequent deed. However, in that view of the case, I shall not order the production of the deed itself, but allow the plaintiffs to take any steps for the purpose of bringing the other persons interested in the matter before the Court." It has been suggested that in the present case the other persons beneficially interested should be before the Court. I do not think it is necessary that they should. The only persons suggested are persons who stand in precisely the same position as the Plaintiff, and, in my opinion, they have no right to prevent him from inspecting the deeds, to which he has quite as much right as they have. The third case is *Simpson* v. *Bathurst* (2), in which Lord *Hatherley*, L.C., said (3): "With respect to the trustee *Bathurst*, for whose removal the bill prays, he has, for the reasons he has himself stated, taken upon himself to be a partisan of the wife, and thrown impediments in the way of tenants obtaining leases from the husband, and has refused production of the deeds, which, as trustee, he was bound to produce to all persons interested in the trust." It seems to me, therefore, that the Plaintiff is entitled to see the deeds, subject to this, that there might be circumstances which would justify the trustees in withholding them from him. But nothing has been shewn which can justify them in doing so. The trustees' solicitor has not looked at the deeds at all, and yet it is said that the production of them to the Plaintiff might possibly tend to the disclosure of some flaw in the title to the property, and I am told that there is a presumption that every title has some flaw in it. In my opinion no case has been established for withholding the deeds from the Plaintiff, and I think he is entitled to the production of them for the inspection

(1) 21 Beav. 547. (2) Law Rep. 5 Ch. 193.
(3) Law Rep. 5 Ch. 202.

of himself or his solicitor. I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist. The Defendants must pay the Plaintiff's costs, but this will be without prejudice to any application by them for the payment of the costs which they pay to the Plaintiff and of their own costs out of the trust estate.

Solicitors for Plaintiff: *Mear & Fowler.*

Solicitors for Defendants: *Kingsford, Dorman & Co.*, agents for *Stringer & Bannon, New Romney.*

W. L. C.

In re VAUGHAN. VAUGHAN *v.* THOMAS.

[1886 V. 69.]

Trust — Perpetuity — Repair of Tomb — Charity — Repair of Churchyard — Church Building Act (43 *Geo.* 3, *c.* 108), *s.* 1 [*Revised Ed. Statutes, vol. iv., p.* 332]—*Mixed Objects of Legacy—Apportionment.*

A bequest of money, not exceeding £500, on trust to apply the income in repairing a churchyard, is good under the Act 43 Geo. 3, c. 108, s. 1, and is a charitable legacy.

A testator bequeathed £500 on trust to invest, and to apply such part of the income as might be necessary in keeping a family vault in repair, and to apply the residue of the income in keeping in repair a tomb and the churchyard in which the vault and tomb were situated:—

Held, that the trust to keep in repair the vault was void, and that the portion of the fund devoted to that purpose fell into the gift of the residue; that the residuary trust was void so far as it related to keeping in repair the tomb, and valid so far as it related to keeping in repair the churchyard; and that the void portion of the bequest was so much of the £500, the amount to be ascertained by affidavit, as when invested in consols would produce sufficient income to keep in repair the tomb.

JAMES VAUGHAN, late of *Builth*, died in December, 1884, having made a will containing the following bequest:—"I bequeath the sum of £500 unto my trustees upon trust to invest the same on government security, and to apply such part of the income thereof as may be necessary in or towards the expense of repairing and keeping in repair the family vault, tomb, and rails

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that I have erected in the parish churchyard of *Llansaintfread*, in *Elvel* aforesaid, and the residue of such income in or towards the expense of repairing or keeping in repair the tomb erected to the memory of my late brother *Thomas*, and the repairing and keeping in repair the same parish churchyard. I declare that the legacies bequeathed by me for charitable purposes shall be fully paid out of such part of my personal estate as may be legally devoted to charitable purposes, and shall be paid out of that fund in preference to all the pecuniary legacies bequeathed by this my will."

This was an originating summons to have it determined whether the above bequest was to any and what extent a good and valid charitable bequest. The Plaintiff was the surviving acting executor and trustee, the Defendants were two of the residuary legatees under the will of *James Vaughan*.

Blackmore, for the Plaintiff:—

Failing the validity of the trust to repair the family grave, the residuary gift is not invalidated if it is charitable; on the contrary, the whole £500 would be applicable to that residuary gift if it were charitable: *Fisk* v. *Attorney-General* (1); *In re Birkett* (2); *In re Williams* (3); *Hoare* v. *Osborne* (4). The residuary gift is lawful so far as the repair of the churchyard is concerned: in the first place, it is within the 1st section of the *Church Building Act* (43 Geo. 3, c. 108), which provides that persons may devise land not exceeding five acres, and bequeath goods and chattels not exceeding in value £500, for, among other things, the repair of churchyards. In the next place the repair of a churchyard is a charitable object. A charitable object includes any object for a charitable purpose: *Mellick* v. *President and Guardians of the Asylum* (5). It is the duty of the parishioners to keep the churchyard in repair: *Coke's* 2nd Inst. (6). And a person whose duty it is to keep a churchyard in repair is indictable for not repairing it: *Rex* v. *Reynell* (7).

(1) Law Rep. 4 Eq. 521.
(2) 9 Ch. D. 576.
(3) 5 Ch. D. 735.
(4) Law Rep. 1 Eq. 585.
(5) Jac. 184.
(6) Ed. 1809, p. 489.
(7) 6 East, 315.

The same rule will apply as to the gift of the residue: it is a bequest to two objects—one bad, the other charitable and therefore good. The primary object to which the fund is intended to be applied fails, therefore the whole goes to the secondary object.

Kenyon Parker, for the Defendants :—

If a bequest of £500 in money to keep in repair a churchyard can be sustained under 43 Geo. 3, c. 108, such a gift is not charitable. It is not for the benefit of the public generally that a particular churchyard should be kept in repair, the public generally have no right to be buried there. A trust to keep in repair one or more tombs is clearly bad, and it has never been suggested that the Act of *George* III. affects the law on that point, therefore a trust to keep in repair any number of or all the tombs in a churchyard is void. The bequest not being charitable, the rule in *Fisk* v. *Attorney-General* (1), on the assumption that it is good law, does not apply, that is to say, there being a bequest of a fund which is to be applied in the first place to an illegal object and what is over is to be applied to something else, the residuary gift fails. The cases, such as *Hunter* v. *Bullock* (2) and *Dawson* v. *Small* (3), where there is a good gift coupled with an honorary trust for a perpetuity, do not apply. But the principle of *Chapman* v. *Brown* (4), followed in *Cramp* v. *Playfoot* (5) and recognised in *Hunter* v. *Bullock*, does apply and is still good law.

If the Court should consider that the residuary gift is partly good, the proper way to ascertain the good amount is, in accordance with *Hoare* v. *Osborne* (6), to divide the fund according to the number of objects, so that the gift would fail as to half and be good as to half.

Blackmore, in reply :—

On the assumption that some part of the bequest fails there would be no difficulty in ascertaining how much capital the keeping in repair the tomb would require, and investing the balance for the purpose of keeping in repair the churchyard.

(1) Law Rep. 4 Eq. 521.
(2) Ibid. 14 Eq. 45.
(3) Ibid. 18 Eq. 114.
(4) 6 Ves. 404.
(5) 4 K. & J. 479.
(6) Law Rep. 1 Eq. 585.

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In respect to the first trust, to apply such part of the income as may be necessary in or towards the expense of repairing and keeping in repair the testator's family vault, tomb, and rails, that in my opinion is clearly void according to the cases, of which *Hoare* v. *Osborne* (1) is one.

Then the testator goes on to give the residue of the income of the £500, and in my opinion the money that might have been applied towards repairing his family vault falls into that residue. The cases which make that clear are *Dawson* v. *Small* (2), *In re Williams* (3), and *In re Birkett* (4).

Then we come to the construction of the gift of the residue itself. It is "And the residue of such income in or towards the expense of repairing and keeping in repair the tomb erected to the memory of my late brother *Thomas*." The remarks I have already made about the repair of the family vault apply to that also; and therefore the direction to keep up that tomb is of no effect. The will goes on "and the repairing and keeping in repair the same parish churchyard." Now, if the whole residue were given for that purpose, I am clearly of opinion there would have been a good gift to a charitable object. In the Act of 43 Geo. 3, c. 108, which enables land not exceeding five acres, and goods and chattels not exceeding £500 in value, to be given for the purposes mentioned, the 1st section is prefaced by a recital: "Whereas a sufficient number of churches and chapels for the celebration of divine service, according to the rites and ceremonies of the United Church of *England* and *Ireland*, and of mansion-houses with competent glebes for the residence of ministers officiating in such churches and chapels, is necessary towards the promotion of religion and morality." Then it recites a deficiency, and that "many well-disposed persons would be desirous of contributing towards the supply of such defects, if they were enabled so to do in the manner hereinafter directed." Then it enables persons to give, in the manner mentioned in sect. 1, an interest in lands or tenements not exceeding five acres, or goods and chattels not exceeeding in value £500, "for or towards the

(1) Law Rep. 1 Eq. 585.
(2) Ibid. 18 Eq. 114.
(3) 5 Ch. D. 735.
(4) 9 Ch. D. 576.

erecting, rebuilding, repairing, purchasing, or providing any church or chapel where liturgy and rites of the said United Church are or shall be used or observed, or any mansion-house for the residence of any minister of the said United Church, officiating or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard, or glebe for the same respectively;" and a little further on it says that the persons who take shall have full capacity to take, hold, and enjoy as well from such persons "as shall be so charitably disposed to give the same" as from all persons willing to sell. Now it seems to me, looking at the recital that the object of the section is for the promotion of religion and morality, that a gift of anything within the words of the section is made towards the promotion of religion and morality, and is clearly a charitable use: and the provision for the making or repair of a churchyard comes within the section.

Then, in the next place, there is this to be borne in mind, that charity is "a general public use." That is the largest definition of the word, and it seems to me that the repair of a parish churchyard is clearly for the benefit of the inhabitants of the parish. In the first place, it was the duty of parishioners to keep their churchyard in repair. That appears from a passage in *Coke's* Second Institute (1); which runs thus: "The parishioners ought to repaire the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those, that were or should have been whiles they lived the temples of the Holy Ghost." After referring to the derivation of the word "cemetery," it goes on: "And also if the churchyard be not decently inclosed, the church, which is *domus Dei* cannot decently be kept, and therefore this the parishioners ought to doe *per consuetudinem notoriam et approbatam*, and the conusans thereof is allowed by this Act."

Then, again, a case was cited which shews that if a person whose duty it is to repair the churchyard does not repair it he is subject to indictment.

It is clear that the repair of a church is beyond all question a charitable object. So, too, the repair of a parsonage: *Attorney-General* v. *Bishop of Chester* (2) is an authority for that. The

(1) Ed. 1809, p. 489. (2) 1 Bro. C. C. 444.

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repair of ornaments of a church has been held a charitable object in *Hoare* v. *Osborne* (1). There Vice-Chancellor *Kindersley* said: "With respect to the monument in the church, there is no decision on the point how far a gift for the perpetual repair, not of the fabric of the church, but of the ornaments in the church, can be treated as a charity. In the absence of authority, I think I ought to hold such a gift to be a charity, and as such, good." Now he gives his reasons: "It seems to me to come within the equity of the statute, for it is clearly for the benefit of the inhabitants of the parish that not only the fabric, but also that the ornaments of the church, whether in the shape of mural tablets or otherwise, should not be permitted to fall into a state of dilapidation and decay; and therefore it appears to me that the gift for keeping in perpetual repair this monument is a good charitable gift." To put it shortly, I do not see any difference between a gift to keep in repair what is called "God's house," and a gift to keep in repair the churchyard round it which is often called "God's acre."

Then it is said that keeping in repair the tombs in a churchyard is only the same thing as keeping in repair a tomb in the churchyard. I do not think so. A testator providing for the repair of a family tomb is only ministering to his own private feeling or pride, or it may be to a feeling of affection he has for his own relations; and it is not for the benefit of the parish at large that a particular tomb should be kept in repair. But in respect of the repair of the churchyard as a whole, it is for their benefit. That distinction was pointed out by Lord *Romilly* in the case of *Rickard* v. *Robson* (2), where he says: "I have had to consider this point lately in a case respecting the promulgation of the doctrines of *Joanna Southcote*. In that case, I thought the gift was intended to be for a public benefit, and that it was a charitable gift which could be supported; but on comparing it with the present, I am satisfied this does not come within the term 'charity,' and it is not within any of the words used in the preamble of the 43 Eliz. c. 4. *Lloyd* v. *Lloyd* (3) and the other case of *Thomson* v. *Shakespeare* (4) shew, that a gift merely for the purpose of keeping up a tomb or building which is of no public benefit, and only an

(1) Law Rep. 1 Eq. 585, 588.
(2) 31 Beav. 244, 245.
(3) 2 Sim. (N.S.) 255.
(4) Joh. 612; 1 D. F. & J. 399.

individual advantage, is not a charitable use but a perpetuity. The cases run into very fine distinctions, because if the gift is to keep up an institution for the benefit of the public, then it is clearly a charity. But that does not occur in this case, for here the gift is merely to keep up certain individuals' tombs."

It seems to me clear therefore that if the gift had been for keeping in repair the churchyard and nothing else it would have been good. But in the present case the gift of the residue of the income was "in or towards the expense of repairing or keeping in repair the tomb erected to the memory of my late brother *Thomas*, and the repairing and keeping in repair the same parish churchyard." And it is said to be one complete and entire gift, a part of which, at any rate, is bad, and that the amount of the bad part cannot be ascertained, and therefore the whole is bad. That proposition seems to me not in accordance with the authorities. There is no difficulty in ascertaining the respective amounts to be assigned to the several objects, which is what ought to be done if possible: see *Hoare* v. *Osborne* (1). Then there is another case on this point, that of *In re Rigley's Trusts*, before Vice-Chancellor *Kindersley* (2). There there was a gift of a fund in trust to apply the income towards keeping up a family vault in a churchyard, and also a monumental tablet in the parish church, and the fabric whereon and under which the same stood, and the railing in front thereof, and the residue of the income the testator directed to be handed over to the minister and churchwardens for the time being to be laid out for the benefit of the poor of the parish. The Vice-Chancellor pointed out that as far as related to the tablet and the fabric over it in the church there was no difficulty in holding that the gift was good. He continued (3): "Nor do I feel any more difficulty with respect to the other objects of the testator's bounty, namely, the vault and tombstone in the churchyard, with the fencing and the yew tree. It appears to me that as to those I must hold that the gift is not good. The Act of 43 Geo. 3, which was not cited in the cases I have referred to, has been introduced into this case, and it has been contended that, if it had been there cited, those cases would have been decided otherwise. I cannot agree to that, able as the argument was. I think that the repair of a tomb in

(1) Law Rep. 1 Eq. 585. (2) 36 L. J. (Ch.) 147. (3) 36 L. J. (Ch.) 149.

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a churchyard was not in the contemplation of the legislature in framing that statute, and is not within the scope of the Act. That being so, the question is, what is to be done? Where the Court can ascertain how much is required for one object, and how much for another, it will direct an inquiry. If not, the fund must be divided according to the number of the objects. Then the question arises, what is here the number of the objects? Are they five, six, or seven? And is not the case such that the Court sees, *à priori*, that it is utterly impossible for it to determine how much is wanted for each; or is it reasonable to suppose that an inquiry may lead to some conclusive result? I can feel no difficulty in saying that the objects within the church require more for their reparation than those in the churchyard; but as to what proportion should be allotted to each I cannot venture to express an opinion. Still I cannot say that we could not arrive at it; and therefore I shall direct an inquiry how much will be required *de anno in annum* to repair the objects specified in the church and churchyard respectively. It will not be sufficient to ascertain the mere proportions, because the gift of the surplus may be affected by the result of the inquiry."

Now acting on those authorities, and on *Fisk* v. *Attorney-General* (1) and *Champney* v. *Davy* (2), I find no difficulty here in saying that the gift of the residue is not void altogether; but that to the extent to which the gift is to repair the churchyard it is good; and I do not think there can be any difficulty in ascertaining what the expense of keeping in repair the brother's tomb would be. I need not fix the amount at the present moment, I can direct an inquiry as to that. To the extent of the capital representing the annual amount necessary to keep that tomb in repair, treating the capital as invested in consols, the gift fails. The rest of the £500 should be invested, in the manner directed, on trust to apply the income in repairing the parish churchyard.

To avoid the expense of an inquiry an affidavit of a competent person may be made before the order is drawn up as to what sum is necessary to keep the tomb in repair.

Solicitors for all parties: *Thomas White & Sons.*

(1) Law Rep. 4 Eq. 521. (2) 11 Ch. D. 949.

D.

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June 29.

In re SMITH.
HANNINGTON *v.* TRUE.
GILES *v.* TRUE.

[1880 S. 0714.]
[1880 S. 1013.]

Will—Mortgaged Estate—Exoneration—Specific Devise—"Contrary or other intention"—Locke King's Act (17 & 18 *Vict. c.* 113) [*Revised Ed. Statutes, vol. xii. p.* 387]; 30 & 31 *Vict. c.* 69 [*Revised Ed. Statutes, vol. xv., p.* 413].

A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely, to do with as she thinks proper;" and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage:—

Held, that the will did not shew any "contrary or other intention" within the meaning of *Locke King's Act*, and that consequently the widow took the house subject to its rateable proportion of the mortgage debt.

Brownson v. *Lawrance* (1) dissented from.

Sackville v. *Smyth* (2) and *Gibbins* v. *Eyden* (3) followed.

THIS was a creditor's action for the administration of the real and personal estate of *J. H. Smith*, who died on the 25th of January, 1880. The testator, by his will, dated the 13th of November, 1877, directed his debts, funeral, and testamentary expenses to be paid, and he gave to his wife his freehold residence at *Portslade*, with all the furniture and household contents therein, absolutely, "to do with as she thinks proper." And he appointed *John True* and his wife executor and executrix of his will, and requested them to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The whole of the testator's real estate was subject to one mortgage.

This was the further consideration of the action, and one question was whether the testator had by the will shewn a "contrary or other intention," so to exclude the operation of *Locke King's*

(1) Law Rep. 6 Eq. 1. (2) Law Rep. 17 Eq. 153.
(3) Law Rep. 7 Eq. 371.

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Act, and to make the other real estate, as between it and the house devised to the widow, primarily liable to the payment of the mortgage debt.

Cozens-Hardy, Q.C., and *Colt*, for the Plaintiff:—

There is no sufficient expression in the will of a "contrary or other intention" so as to exclude the operation of *Locke King's Act* (30 & 31 Vict. c. 69), and the widow takes the house subject to its proportion of the mortgage debt: *Sackville* v. *Smyth* (1).

Butcher, for the widow:—

A "contrary or other intention" has been shewn by the testator. *Sackville* v. *Smyth* is directly opposed to *Brownson* v. *Lawrance* (2). The latter case is a decision that the fact that one of two properties comprised in the same mortgage is specifically devised, while the other is left to pass under a residuary devise, is sufficient to exclude *Locke King's Act*, and make the estate which passes under the residuary devise primarily liable to the whole of the mortgage debt. In the present case the intention to exclude the Act is corroborated by other parts of the will. *Jessel*, M.R., in *Sackville* v. *Smyth*, only decided that the mere fact that the one estate was specifically devised, while the other was left to pass as residue, was not of itself enough to exclude *Locke King's Act*. But that fact may be enough to shew a *primâ facie* intention to do so, and in this case the testator also says that his wife is to have the house "to do with as she thinks proper."

[*Cozens-Hardy*, Q.C., referred to *Gibbins* v. *Eyden* (3).]

That case goes no further. Vice-Chancellor *Malins* there said that Lord *Romilly* had, in *Brownson* v. *Lawrance*, overlooked the fact that in *Hensman* v. *Fryer* (4) it had been decided that a residuary devise is still specific, notwithstanding the *Wills Act*. In the present case there is not a residuary devise properly so called; the house is devised specifically to the widow, and the residue of the real estate is devised on trust for sale.

(1) Law Rep. 17 Eq. 153.
(2) Ibid. 6 Eq. 1.
(3) Law Rep. 7 Eq. 371.
(4) Ibid. 3 Ch. 420.

NORTH, J.:—

I think the case is covered by authority. Mr. *Butcher* has relied on *Brownson* v. *Lawrance* (1), which is no doubt in his favour. But that case is inconsistent with the decision of Lord *Chelmsford*, L.C., in *Hensman* v. *Fryer* (2), and with that of Vice-Chancellor *Malins* in *Gibbins* v. *Eyden* (3), in which case the Vice-Chancellor pointed out that Lord *Romilly* had in *Brownson* v. *Lawrance* overlooked *Hensman* v. *Fryer*, which decided that a residuary devise is still specific. I cannot follow *Brownson* v. *Lawrance* without departing from the decision of *Jessel*, M.R., in *Sackville* v. *Smyth* (4). I can find nothing else in the will to take the case out of the general rule, except the words "absolutely, to do with as she thinks proper." But that is no more than a gift to the widow in fee; it does not say that she is not to take the house subject to its proportion of the mortgage debt. It would come to this, that every devise of an absolute interest in real property would be an expression of a "contrary or other intention." I cannot follow *Brownson* v. *Lawrance*, but I must follow the later decisions. The mortgage debt must be borne rateably by all the properties comprised in the mortgage.

Solicitors: *Nash, Field & Withers*, agents for *Stuckey, Son, & Pope, Brighton; Nye, Greenwood & Moreton.*

(1) Law Rep. 6 Eq. 1.
(2) Ibid. 3 Ch. 420.
(3) Law Rep. 7 Eq. 371.
(4) Ibid. 17 Eq. 153.

W. L. C.

Mellor v. *Daintree* (1886) 33 Ch. D. 198
Followed. *In re* SMITH. VEASEY
v. SMITH - - [1948] 1 Ch. 49

NORTH, J.

1886

June 26, 28.

MELLOR *v.* DAINTREE.

[1875 M. 51.]

Will—Construction—Supplying Omission by Inference.

The principles on which the Court acts in supplying by inference an omission in a will discussed.

An omission may be supplied in the case of independent gifts to strangers, as well as in the case of a series of gifts to children of a testator, or to members of a class.

A testator devised and bequeathed his real and residuary personal estate to trustees, on trust as to one moiety of the personalty and a specific part (being about half in value) of his realty to accumulate the income until *B.* should attain twenty-five or die, whichever should first happen, in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust to pay the income to *B.*, if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust for *B.* absolutely in case he should attain twenty-five, and in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of whom, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or, if more than one, the first surviving son of *B.* who should attain twenty-one. And the testator directed that the second moiety of the personalty and the rest of the realty should be held on trust to accumulate the income until *D.* should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, and in case that period should expire before either of such events should happen, then upon trust to pay the income to *D.* (if living) from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely." But, in case *D.* should leave no son him surviving, the property was to be held in trust for *R.* absolutely.

B. was a stranger in blood to the testator; *D.* was the testator's nephew. *D.* attained twenty-five.

Held, that, having regard to the whole scheme of the will, an absolute gift of the second moiety to *D.* at twenty-five must be implied.

PETITION in a suit to determine the construction of a will.

Simon Alfred Daintree, by his will, dated the 18th of May, 1870, after bequeathing some specific and pecuniary legacies (among

which was a legacy of £2000 to trustees, upon the trusts hereinafter declared), bequeathed the residue of his personal estate to trustees, upon trust for sale and conversion as therein mentioned, and out of the proceeds to pay his debts and funeral and testamentary expenses and legacies, and to invest the remainder as therein mentioned, and to stand possessed of the stocks, funds, and securities for the time being forming his residuary personal estate upon the trusts thereinafter declared. And he devised all his real estates to the use of his trustees and their heirs, upon the trusts thereinafter declared. And he declared that his real estate and his residuary personal estate should be held upon trust, in the first place, to pay to his wife *Elizabeth* an annuity of £400 during her life, and, in the second place, to pay to his uncle, *J. C. Daintree*, from and after the decease of his wife, *Ann Daintree*, an annuity of £100. The will proceeded as follows: "And upon further trust, as to my *Needingworth* and *Colne* estates, and a moiety of my residuary personal estate, to accumulate the rents and profits, income and dividends thereof, until *Alfred Ernest Bagley*, the son of *Harriet Bagley*, spinster, shall attain the age of twenty-five years or die, which shall first happen, in case either of such events shall happen within the period of twenty-one years from my death, but, in case that period shall expire before either of such events shall happen, upon trust to pay to or permit the said *A. E. Bagley*, if living, to receive the income of my said *Needingworth* and *Colne* estates, and moiety of my residuary personal estate, from the expiration of such period until he shall attain the age of twenty-five years or die, whichever shall first happen; and, subject as aforesaid, I direct that my said *Needingworth* and *Colne* estates and a moiety of my said residuary personal estate shall be held in trust for the said *A. E. Bagley* absolutely, in case he shall attain the age of twenty-five years; and, in case the said *A. E. Bagley* shall die under the age of twenty-five years leaving a son or sons him surviving, who, or any one of whom, shall attain the age of twenty-one years, my said *Needingworth* and *Colne* estates, and a moiety of my said residuary personal estate, shall, subject as aforesaid, be held in trust for the only, or, if more than one, the first surviving son of the said *A. E. Bagley* who shall attain the age of twenty-one years. And I declare that

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my *Bluntisham* estate, and all other my real estates other than my *Needingworth* and *Colne* estates, and the remaining moiety of my residuary personal estate, also subject in like manner as aforesaid, shall be held upon trust to accumulate the rents, profits, income, and dividends thereof until *Alfred Daintree*, the son of my brother *Richard Daintree*, shall attain the age of twenty-five years or die, whichever shall first happen within the period of twenty-one years from my death, and, in case that period shall expire before either of such events shall happen, then upon trust to pay to or permit the said *Alfred Daintree*, if living, to receive the income and dividends of my said estates from the expiration of such period until he shall attain the age of twenty-five years or die, whichever shall first happen. And, subject as aforesaid, all my said real estates and my said residuary personal estate, shall be held in trust for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely. But, in case the said *Alfred Daintree* shall leave no son him surviving, then all my said real estate and residuary personal estate shall be held in trust for (but nevertheless subject to and on failure of the trusts hereinbefore declared concerning the same) my said brother *Richard Daintree*, his heirs and assigns for ever." And the testator directed his trustees to invest the legacy of £2000 as therein mentioned, and to keep the same distinct from any part of his residuary personal estate, and to stand possessed thereof "Upon trust to apply the income thereof towards the maintenance, education, and support of the said *A. E. Bagley* until he attain the age of twenty-one years, whichever shall first happen, and, in case and after the said *A. E. Bagley* shall attain the age of twenty-one years, upon trust to pay to or permit the said *A. E. Bagley* to receive the income thereof, until he shall attain the age of twenty-five years or die, whichever shall first happen: Provided that it shall be lawful for my said trustees, at any time after he shall have attained the age of eighteen years, and before he shall have attained the age of twenty-one years, to raise out of the capital of the trust fund any sum or sums not exceeding in the whole £500, and pay and apply the same for the advancement in the world of the said *A. E. Bagley* in such manner as my said trustees shall think fit; and provided also that, whether any

sum or sums of money shall have been raised under the provision lastly herein contained or not, it shall be lawful for my said trustees, at any time after the said *A. E. Bagley* shall have attained the age of twenty-one years, and before he shall have attained the age of twenty-three years, at his request in writing, to raise out of the capital of the trust fund any sum or sums not exceeding in the whole the sum of £500, and pay and apply the same for the advancement in the world of the said *A. E. Bagley*, in such manner as my trustees think fit. Subject as aforesaid the said trust fund, or so much thereof as shall not have been applied by way of advancement, shall be held upon trust for the said *A. E. Bagley*, in case he shall attain the age of twenty-five years, but, in case the said *A. E. Bagley* shall die under the age of twenty-five years without leaving a son him surviving who shall attain the age of twenty-one years, the said trust fund shall sink into and form part of the residue of my estate, and be accordingly held upon the trusts herein declared concerning the same, or such of them as shall for the time being be subsisting and capable of taking effect. And I direct that all accumulations arising from my said real estates and residuary personal estate respectively, and the income of such accumulations, shall follow the destination of the several estates out of which they shall respectively have arisen and the income of such estates respectively, and be respectively held upon trust and paid and applied accordingly. I empower my trustees or trustee, after the respective deaths of the said *A. E. Bagley* and *Alfred Daintree*, during the suspense of the indefeasibly vesting of my residuary personal estate, to apply, at their or his discretion, all or any part of the income and dividends of such estate respectively for the maintenance and education of the person entitled, or for the time being presumptively entitled, to such estates respectively, and to accumulate the surplus of such moneys and dividends, with power to apply any such accumulations for the time being for the advancement in the world of the person so entitled, or for the time being presumptively entitled, as aforesaid, to such estates respectively, and such accumulations, and the income thereof, shall follow the ultimate destination of the respective estates out of which the same shall have arisen, and the income of such

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estates, and be respectively held in trust and applied accordingly. I direct my trustees or trustee, until some person shall, under the trusts of this my will become absolutely and indefeasibly entitled to my said real estates respectively, and also during the minority of any son of the said *Alfred Daintree* who shall become entitled to my said real estate, or any part thereof, out of the rents and profits of such portion of my said real estate as may be incumbered, to keep down the interest of all charges affecting the same respectively, and to pay all necessary outgoings in respect of the same respectively."

The testator died on the 27th of April, 1872, and his widow died on the 13th of October, 1874.

This suit was commenced in the Court of Chancery on the 8th of March, 1875, for the administration of the trusts of the will, and Vice-Chancellor *Malins*, on the 20th of July, 1875, made a decree directing certain accounts and inquiries to be taken and made, but no decision was then given on the construction of the will. The Chief Clerk by his certificate found that the sole next of kin, according to the statutes for the distribution of intestates' estates, of the testator living at the time of his death was his father, *Richard Daintree* the elder, who, with the testator's widow, were the persons entitled in distribution under the statutes, and that *Richard Daintree* the elder was the testator's heir-at-law at the time of his death.

On the 4th of October, 1877, *Richard Daintree* the elder and *Richard Daintree* the younger executed a deed by which they conveyed to *Alfred Daintree*, his heirs and assigns, all their estate and interest of and in the real estate of or to which the testator died seised, possessed, or entitled, and the rents and profits thereof accruing and already accrued (other than a contingent interest of *Richard Daintree* the younger under the will in two advowsons). And by the same deed *Richard Daintree* the elder and *Richard Daintree* the younger assigned to *Alfred Daintree*, his executors, administrators, and assigns, all their share and interest of and in the residuary personal estate of the said testator, and the income and dividends thereof, and the accumulations of such income and dividends.

Richard Daintree the younger died on the 20th of June, 1878,

having by his will devised all his interest under the will of the testator in the real estate of the testator to *Alfred Daintree* absolutely, if he should attain the age of twenty-one years.

J. C. Daintree, the testator's uncle, died on the 1st of August, 1883.

On the 13th of August, 1884, *Alfred Daintree* married. At the time of the presentation of the petition there had been only one child of the marriage, a son, born on the 19th of February, 1886.

Prior to his marriage *Alfred Daintree* executed marriage articles, dated the 12th of August, 1884, by which he covenanted with trustees that he would, when and as he should attain twenty-five, execute all necessary deeds for providing (so far as he had power so to do) that his wife should, from and after his death, if she should survive him, take a life interest in the whole of the real estate to which he was entitled under the will of the testator and the will of *Richard Daintree* the younger.

Alfred Daintree attained the age of twenty-five on the 26th of July, 1885.

The petition was presented in the suit by *Alfred Daintree* and his wife, and the trustees of the marriage articles, and was served on the devisee of trust estates of the surviving trustee of the testator's will; on *A. E. Bagley;* and on the infant son of the Petitioner *Alfred Daintree.*

The petition prayed (*inter alia*):—

(1.) That it might be declared that *Alfred Daintree* became, on attaining the age of twenty-five years, and was, absolutely entitled to one moiety of the testator's residuary personal estate.

(2.) That it might be declared that *Alfred Daintree* became, on attaining the age of twenty-five years, and was (subject nevertheless to the provisions of the marriage articles), absolutely entitled in fee simple to all the real estate of the testator, other than the *Needingworth* and *Colne* estates.

Napier Higgins, Q.C., and *Rashleigh*, for the Petitioners:—

The Court will supply by inference words which have been clearly omitted from a will by mistake. If by the will as a whole a clear intention is shewn to give a benefit to a particular person, the Court will give effect to that intention, even though

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there is no express gift to him: *In re Redfern* (1); *In re Daniel's Settlement Trusts* (2); *Sweeting* v. *Prideaux* (3); *Greenwood* v. *Greenwood* (4); *In re Northen's Estate* (5). The Court will always avoid an intestacy, if it can do so on a rational construction of a will. On this will as a whole there is a clear intention that *Alfred Daintree* shall take an absolute indefeasible interest, if and when he attains twenty-five. The Petitioners ask the Court in effect to imply the following words after the words "subject as aforesaid":—

"I direct that my *Bluntisham* estate and all other my real estate (other than my *Needingworth* and *Colne* estates) and the remaining moiety of my residuary personal estate shall be held in trust for the said *Alfred Daintree* absolutely, in case he shall attain the age of twenty-five years, and, in case the said *Alfred Daintree* shall die under the age of twenty-five years leaving a son or sons him surviving, who, or any one of whom, shall attain the age of twenty-one years then subject as aforesaid,"

P. B. Abraham, for *Alfred Daintree's* infant son:—

The ultimate gift over is in the event of *Alfred Daintree* leaving no son surviving him. If the previous taker is not intended to be a son of *Alfred Daintree*, there would be a gift over on the failure of a person to whom there is no previous gift. The Petitioners want to introduce a clause the effect of which would be to strike out, except in the event of *Alfred Daintree* dying under twenty-five, any gift to his children.

A testator has a right to be eccentric or capricious in his dispositions. In order to insert words the Court must come to the conclusion that the will would be utter nonsense without them. There would be nothing insensible in holding, either that only a life estate to *Alfred Daintree* must be implied, or that there is an intestacy. The only ground for saying that an absolute gift to *Alfred Daintree* at twenty-five ought to be implied is, that there is such a gift of the first moiety to *A. E. Bagley*. That is not a sufficient reason. The gifts of the two moieties are quite distinct,

(1) 6 Ch. D. 133.
(2) 1 Ch. D. 375.
(3) 2 Ch. D. 413.
(4) 5 Ch. D. 954.
(5) 28 Ch. D. 153.

and the words of the two, so far as they accord, are not identical. The gift to the sons of *Alfred Daintree* is absolute, not conditional on their attaining twenty-one, as in the case of *A. E. Bagley*. The provisions as to maintenance are quite consistent with the will as it stands. The cases cited do not justify what is asked by the Petitioners.

T. L. Wilkinson, for the trustee of the testator's will:—

It is for the interest of the widow's representatives that there should be an intestacy as to the personal estate. There is no general scheme of the will, as in the case where a testator is providing for his own children, or for a class of persons not members of his own family. In such case there would be a presumption that he intended to put all the members of the class on the same footing. In the present case there is no relationship between the two legatees, and the testator may well have intended to provide for them differently. This distinguishes the case from those which have been cited. If the words suggested are imported into the will, there will be an inconsistency; the gift to *Alfred Daintree's* sons will be contingent on their attaining twenty-one, and this will not fit in with the gift over to *Richard*. There will be a partial intestacy. If any words ought to be implied, there is nothing to shew that *Alfred Daintree* is to take an absolute interest at twenty-five.

Elgood, for *A. E. Bagley*.

NORTH, J.:—

After hearing the case fully argued by the trustee on behalf of the widow, I do not think it necessary to appoint any one to represent her, or to require that she should be made a party before I dispose of the case. I have come to the conclusion that the will must be read as if it had contained the words which it is suggested by Mr. *Higgins* it ought to have contained. In my opinion, I can find in the will itself (not, of course in so many words) enough to shew that that is the true meaning of the words which have been used. I decline altogether to decide the case on any mere conjecture of what the testator intended. It is

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unnecessary for me to refer to any authorities other than two which have been mentioned. The first is *Sweeting* v. *Prideaux* (1), in which Vice-Chancellor *Hall* said (2): "Several cases have been referred to, but the principle which will guide me is to be found in the case of *Key* v. *Key* (3), where Lord Justice *Knight Bruce* said (4): 'In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.' And the same principle is to be found in the case of *Towns* v. *Wentworth* (5), where Mr. *Pemberton Leigh* (afterwards Lord *Kingsdown*), said (6): 'When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shews that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared.'" Those are the principles which I conceive to be the law of the Court, and upon which Vice-Chancellor *Hall* acted then, and upon which I propose to act now. I may refer also to the observations of Vice-Chancellor *Bacon* in *In re Redfern* (7). He said (8): "I think that upon a reasonable construction of

(1) 2 Ch. D. 413.
(2) Ibid. 415.
(3) 4 D. M. & G. 73.
(4) Ibid. 84.
(5) 11 Moo. P. C. 526.
(6) Ibid. 543.
(7) 6 Ch. D. 133.
(8) Ibid. 137.

the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will. If I were to do otherwise I should be going against the canon of construction, that I am to gather the meaning of the testator from the words in which he has expressed his meaning. I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor *Hall* expressed in *Sweeting* v. *Prideaux* (1), that the testator must necessarily have meant what the mere letter of the will does not express."

Before I refer to the particular portions of the will which are material, I will observe that the will, as a whole, is very clumsily and incorrectly expressed. In the gift of £2000 upon trust for the benefit of *A. E. Bagley*, there is a direction that the income is to be applied for his maintenance, &c., till he shall attain the age of twenty-one years, "whichever shall first happen." It is quite clear that two alternatives were referred to, though only one is mentioned. The gift goes on: "In case and after the said *A. E. Bagley* shall attain the age of twenty-one, upon trust to pay to or permit him to receive the income until he shall attain the age of twenty-five or die, whichever shall first happen." Looking at those words it is quite clear that one alternative intended to be inserted in the first instance was omitted, and that there would be no difficulty in supplying it, though by a blunder it has been left out. Again, in the same gift, there is another point which may some day call for serious consideration, though it is not ripe for decision now. The will empowers the trustees, at any time after *A. E. Bagley* shall have attained eighteen, and before he shall have attained twenty-one, to make a certain advance of capital for his benefit, and, again, after he shall have attained twenty-one, and before he shall have attained twenty-three, to make a certain other advance for his benefit, and then come these words: "Subject as aforesaid the said trust fund, or so much thereof as shall not have been applied by way

(1) 2 Ch. D. 413.

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of advancement, shall be held upon trust for the said *A. E. Bagley*, in case he shall attain the age of twenty-five years; but, in case the said *A. E. Bagley* shall die under the age of twenty-five years without leaving a son him surviving who shall attain the age of twenty-one years, then the said trust fund shall sink into" and form part of the residuary estate. Now those two gifts clearly do not correspond. The gift to *A. E. Bagley* in case he shall attain twenty-five is not exhaustive, and, though I do not mean now to express any opinion upon a matter which may have to be considered some day in the presence of persons who are not now before me, because there is no son of *A. E. Bagley* yet in existence, yet, whatever the true construction of the words may be, I see clearly that the will does not in terms express everything which was intended to be provided for. There are, therefore, two obvious blunders in the way in which the will has been framed.

That being so, I approach the consideration of the other clauses of the will without any certainty that what the testator intended will be found expressed in the accurate terms one would wish to find in a will. The general scheme of the will I take to be this: There are two persons for whom the testator intends to provide in substance equally. He does not divide his whole estate into moieties and give exactly one-half to each of them, but he gives certain real estates to *A. E. Bagley* and his issue, and his other real estate to *Alfred Daintree* and his issue, and he gives to each of them a moiety of his personal estate. And, apparently, because the real estates specifically given to *A. E. Bagley* and his issue were somewhat less in value than the others, he sets apart a trust fund of £2000, which he appropriates for the benefit of *A. E. Bagley*, not, it is true, in precisely the same words as the other gifts, but still, as it seems to me, he was substantially dividing his property into moieties between *A. E. Bagley* and *Alfred Daintree*. That being the general scheme of the will, I find that, so far as they are expressed, the provisions as to the two moieties are substantially identical, but there is an omission in the gift in favour of *Alfred Daintree* which has led to the present argument. Now, looking at the words used, we find, as regards the first moiety of the real estate,

as I will, for brevity, call it, and the first moiety of the residuary personal estate, that the income is to be accumulated until *A. E. Bagley* shall attain twenty-five or die, whichever shall first happen, "in case either of such events shall happen within the period of twenty-one years from my death. But, in case that period should expire before either of such events shall happen," then upon trust during the interval (the expiration of the twenty-one years and the happening of the first of the two events), to pay to him or permit him to receive (if living) the income of the first moiety of the real and residuary personal estate, until he attains twenty-five or dies, and, subject as aforesaid, in case he attains twenty-five, those real estates and the moiety of the personal estate are to be held in trust for him absolutely. But in case he shall die under twenty-five, leaving a son or sons him surviving, who, or any one of whom, shall attain twenty-one, then the same real estates and the moiety of the personal estate are given in trust for the only, or, if more than one, the first surviving son, of *A. E. Bagley* who shall attain twenty-one. Now, that is the complete disposition made down to that point of the first moiety of the real and personal estate. It is not exhaustive. It does not provide for every event which could possibly happen, but it deals only with the cases of either *A. E. Bagley* taking absolutely by attaining twenty-five, or his son taking absolutely, if he should die under twenty-five leaving a son who should attain twenty-one. In case *A. E. Bagley* should die under twenty-five without leaving any son who should attain twenty-one, there is not as yet any disposition of that moiety of the estates. Then the testator takes up the remainder of his real estate and the other moiety of his personal estate, and he gives them in favour of *Alfred Daintree* in words which, up to a certain point, though there are one or two very slight differences, correspond substantially with those of the previous gift in favour of *A. E. Bagley*. The income of the second moiety is to be accumulated till *Alfred Daintree* shall attain twenty-five or die, whichever shall first happen within twenty-one years from the testator's death. If that period shall expire before either of those events happen, then the trust is to pay the income to *Alfred Daintree* (if living), from the expiration of that period until he shall attain twenty-

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five or die, whichever shall first happen, "and subject as aforesaid" (and now we come to a serious divergence from the terms of the gift of the first moiety) "all my said real estate and my said residuary personal estate shall be held in trust" (not for *Alfred Daintree* absolutely if he shall attain twenty-five, or if he shall die under twenty-five leaving a son or sons who, or any one of whom, shall attain twenty-one, in trust for the only, or, if more than one, the first surviving son of *Alfred Daintree* who shall attain twenty-one absolutely), but the words are, "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely," and there we come to a full stop. Pausing there, we have a gift which is absolute, entire, and final, if there is a person who can take under it. But there is nothing from which one can say who "*such* only surviving son, or if more than one surviving son, the eldest of *such* surviving sons" is; there is nothing to which the word "such" can be referred. There is no previous reference to any son of *Alfred Daintree*. In my opinion the word "such," as there used, clearly points to something having been previously omitted to which that word is intended to refer. Again, there is the word "surviving," and in construing that word one naturally looks for the happening of some event in the first instance—most probably a death, though it may be something else—to which the word may apply. The word "surviving" may be used as meaning either surviving a particular person, or surviving a particular period of time. It may point to a person surviving a time at which he or some one else attained twenty-one. The word "surviving" does not seem to me so strong a word as "such." But, when we look at the subsequent clause, "but, in case *Alfred Daintree* shall leave no son him surviving," then the second moiety is to be held in trust for the testator's brother *Richard* in fee, it seems to me that there the word "surviving" can only have one meaning, that is, surviving *Alfred Daintree* himself, and, looking at the two clauses together, it seems to me that "such only surviving son" must mean the same thing as "surviving" in the subsequent clause, *i.e.*, "such only surviving son" means such only son of *Alfred Daintree* as is living at the death of *Alfred Daintree*. That being so, we have not only the word "such," but also the word

"surviving," clearly referring to something which is supposed to have gone before, but there is nothing in the will going before to which they can refer. It seems to me clear that something is omitted, and the first question, viz., whether there is any omission, is answered by saying, that these words of reference shew clearly that something has been omitted.

Then comes the question, what has been omitted? I do not say that that is all in the will which shews that something has been omitted, for there are other passages which point the same way, but at this point it is convenient to consider the question, what has been omitted? The gift over is, in case *Alfred Daintree* shall leave no son him surviving—in that event all the said real estate and residuary personal estate are to be held in trust for *Richard Daintree*. It is not necessary to consider at present whether that refers to the whole estate, or only to the last mentioned moiety. The gift over is in case *Alfred Daintree* leaves no son him surviving; it is clear, therefore, that it is not to take effect until after *Alfred's* death. Why is it not to take effect till after that time; who is to take the property in the meantime? It must either go to whoever is meant by the phrase "surviving son of *Alfred*," or there must be an intestacy. In my opinion, the word "surviving" does not apply, and there would in that event be an intestacy, and this fact is a reason, not by any means a conclusive reason, but a reason why, if it can be reasonably avoided, one should not put that construction on the will.

Now, the fact that the estate is given over to *Richard* only in case no son of *Alfred* is left surviving him at his death, seems to me to point very strongly to the gift over being postponed in order to give *Alfred* some interest before *Richard* can take anything. The question is, what is the nature of that interest, and, so far as the gift over at the time of *Alfred's* death throws a light upon it, it would not be necessary to say that he takes by implication more than a life estate. But there are two other passages in the will which seem to me very important. There is this provision: "I empower my trustees or trustee after the respective deaths of the said *A. E. Bagley* and *Alfred Daintree*, during the suspense of the indefeasibly vesting of my residuary personal

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estate, to apply, at their or his discretion, all or any part of the income and dividends of such estate respectively for the maintenance and education of the person entitled, or for the time being presumptively entitled, to such estates respectively and to accumulate the surplus." Now here is a case in which the gift over is, after the death of *A. E. Bagley* as regards one moiety, and after the death of *Alfred Daintree* as regards the other moiety. Though it is one clause dealing with both, it deals with them respectively and applies to each. And here, again, there is a provision in favour of the person who was to take after *Alfred Daintree's* death postponed until the death of *Alfred*, and it is very hard to believe that that can be done for any reason excepting for the purpose of giving *Alfred* a previous interest. This does not shew conclusively that it is to be more than an estate for his life, but it shews very strongly that he was to take, and was assumed to have taken, something under the will, and it is for that reason that provision is only made for the maintenance of his son after his death, because *Alfred* himself was intended to take in the meantime. That, as I say, would leave the question open whether *Alfred* took a life estate or some other estate. But then we come to the final words, and they seem to me conclusive on the matter. In considering what words ought to be supplied by inference, the mere fact that the testator has given one moiety of his estate in favour of one person in a certain way, is not, of course, conclusive to shew the other moiety was intended to go in the same way in favour of another person; yet, looking at the substantial similarity of the two gifts, with the exception of the omission of certain words in the gift of the second moiety, one would expect, I think, to find the same limitations of the second moiety as of the first. It may be that alone would not be enough, though it is a circumstance not to be overlooked, but the clause to which I am now about to refer seems to me conclusive to shew that the testator contemplated that in certain events referred to in his will *Alfred Daintree*, on attaining twenty-five, would acquire an absolute indefeasible interest. The testator says, "I direct my trustees or trustee until some person shall, under the trusts of this my will become absolutely and indefeasibly entitled to my said real estates respectively, and also

during the minority of any son of the said *Alfred Daintree* who shall become entitled to my said real estate or any part thereof, out of the rents and profits of such portion of my real estate as may be incumbered, &c., to keep down the interest of all charges affecting the same, and to pay all necessary outgoings in respect of the same respectively."

Now the only persons whom the testator could contemplate as taking any interest in the second moiety are, first, *Alfred Daintree*; after him any son of his who might attain twenty-one; and thirdly, *Richard Daintree*. In my opinion the testator first of all provides for *Alfred Daintree*. He says that the interest on the incumbrances is to be paid by the trustees until some person shall, under the trusts of the will, become absolutely and indefeasibly entitled to his real estates respectively. In my opinion he was then, as regards this second moiety, referring to *Alfred Daintree*, and no one else.

It is suggested that he might have been referring also to the persons who might take secondly and thirdly. In my opinion he clearly did not refer to the persons who might take secondly, because he immediately goes on to say, "And also during the minority of any son of *Alfred Daintree* who shall become entitled to my said real estates." Therefore, the first alternative cannot be dealing with the case of a son of *Alfred*. And, in my opinion, it does not deal with the person who may be thirdly entitled, because there is nothing to postpone the absolute and indefeasible vesting of *Richard's* interest if the other two persons are out of the way. It seems to me, therefore, that in this clause the testator is clearly, as regards this moiety, dealing with the payment of interest first of all until *Alfred* attains twenty-five. If he attains twenty-five, he contemplates that he will be absolutely and indefeasibly entitled. If, on the other hand, he should not attain twenty-five, but should die under that age leaving a son, then the second branch of the clause provides for the payment of interest during the minority of that son. In case *Alfred* and his son both disappear, then *Richard* takes absolutely, his share is finally vested, and there is nothing whatever for this clause to operate upon.

This clause, as it appears to me, shews to demonstration that

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Alfred was, in a given event, to take an interest under the will, and that, in the event of his attaining twenty-five, it was intended that he should take absolutely.

Looking, therefore, at the whole will, I come to the conclusion that the words which, it is suggested, have been omitted by mistake, are in reality to be gathered from the express terms of the will, and I must make the declarations asked for.

Solicitors: *F. C. Greenfield; W. Elgood.*

W. L. C.

BIRD *v.* WENN.

STIRLING, J.

1886

June 10.

[1885 B. 149.]

First Mortgagee—Subsequent Mortgage—New Mortgage—Consolidation—Equity—Assignee.

A brewery company were first mortgagees for £1000, and the Plaintiff was third mortgagee of a public-house, *A.* The company afterwards took a mortgage of a public-house, *B.*, *A.* and *B.* both belonging to the same mortgagor. The lease of *A.* was nearly out, and by arrangement between all parties the company advanced £1000 for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the brewery company to secure £2000 and advances, and subject thereto to the Plaintiff. By a memorandum given at the same time the Plaintiff declared that the company was to have priority for their £2000 and advances, not to exceed in the whole £2300. The brewery company afterwards transferred both mortgages to the Defendant.

The Plaintiff claimed to redeem *A.*, to which the Defendant objected unless the Plaintiff also redeemed *B.* :—

Held, that though the new mortgage of *A.* to the Plaintiff was in date subsequent to the mortgage of *B.* the intention of the parties was merely to give priority to the company for their £2300 and not to give the company a right to consolidate the mortgage on *A.* and the mortgage on *B.*; and as the whole was equitable the company could not be held to have obtained any such right; nor could their assignee be in any better position.

JAMES BLUMSON was the lessee of two public-houses in *London*, the *Union* and the *Duke of York*. On the 31st of October, 1877, *Blumson* had mortgaged the *Union* first to the *City of London Brewery Company* as a security for £1000 and further advances, and subject thereto to *Booth & Co.* as a security for £600 and advances. On the 18th of October, 1878, he further mortgaged the *Union* to the Plaintiff, *E. J. Bird*, a partner in the brewery of *Ind, Coope, & Co.*, as a security for £200 and further advances. On the 28th of October, 1881, he had mortgaged the *Duke of York* to the brewery company as a security for £1500, and to *Booth & Co.* as a security for £600.

The lease of the *Union* would expire in 1886, and by arrangement between all the parties the old lease was to be surrendered and *Blumson* was to obtain a new lease of the *Union* for the term of forty years, the brewery company advancing £1000 for the

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purpose. Accordingly on the 6th of February, 1883, the agents for all parties met. The old lease was surrendered and a new lease of the *Union* was granted to *Blumson;* and he executed mortgages of the *Union*: 1. To the brewery company by demise for the residue of the term of forty years except the last day thereof, subject to redemption on payment of £2000 and interest and of all such further sums of money as might become due to the brewery company from the mortgagor for goods sold and delivered, or in any way; with a declaration that the restriction on the consolidation of mortgages created by the 17th section of the *Conveyancing Act* of 1881 should not apply to the securities held by the brewery company for the moneys due from the mortgagor. 2. To *Booth & Co.* for £600 and advances. 3. To *E. J. Bird* for £200 and advances. Formal notices of their charges were given to the brewery company on behalf of *Booth & Co.* and of *Ind, Coope & Co.*; and memorandums were given on their behalf to the brewery company as follows: "Notwithstanding the charge on the *Union* public-house, *Emmett Street, Poplar,* this day signed in our favour by Mr. *James Blumson,* or any notice of such charge which we may serve upon you, it is agreed between us that you are entitled to priority over us in respect of your loan of £2000 now advanced, and whatever may be due to you for interest, and also the amount of your book debts which may at any time hereafter be due from the said *James Blumson* to you not exceeding with the said sum of £2000 the sum of £2300 exclusive of interest."

E. J. Bird, representing *Ind, Coope, & Co.,* brought this action against *T. H. Wenn* to whom the two mortgages of the brewery company had been transferred on the 10th of September, 1883, against *Booth & Co.,* and against the trustee in bankruptcy of *Blumson* claiming to redeem the *Union.*

Wenn objected to the redemption of the *Union* unless the *Duke of York* was at the same time redeemed. The Plaintiff denied that on the 6th of February, 1883, *Ind, Coope, & Co.* had notice that the brewery company had any charge on any other property of *Blumson;* and it was not contended that they had such notice.

Barber, Q.C., and *Colt,* for the Plaintiff:—

No doubt the brewery company's mortgage of 1883 was sub-

sequent to the mortgage of the *Duke of York*; but the mortgages of 1883 were all merely in substitution for the mortgages of 1877 and 1878, except so far as priority was given to the further advance of £1000 by the brewery company. *Ind, Coope, & Co.* knew nothing of the mortgage of the *Duke of York*, and of course had no intention to allow that mortgage to be consolidated with the mortgage on the *Union*. The three new mortgages were all on the same day, and if their priorities are to be determined by evidence, the memorandums shew clearly that *Ind, Coope, & Co.* were willing that their charge should be postponed to the £2000 and to advances not exceeding £300, but to nothing else: *Jennings* v. *Jordan* (1) and *Harter* v. *Colman* (2) were cited.

Maclean, Q.C., and *T. L. Wilkinson*, for *Wenn*:—

On the face of the deeds our right to consolidate the mortgages is clear, and the onus is on the Plaintiff to shew how that right is to be defeated. The arrangements of 1883 are entirely new; the old mortgages are gone, and the mortgage on the *Duke of York*, being prior in date, can be consolidated. If that was not to be the case, an express agreement to that effect must be shewn. Consolidation is mentioned, and there is no evidence of any surprise, or that the agents of *Ind, Coope, & Co.* did not know what they were doing. At all events the present Defendant, coming in after the transactions of 1883, has a right to consolidate.

Hemming, Q.C., and *E. Ward*, for *Booth & Co.* and the trustee in bankruptcy, took no part in the argument, as they were not directly affected by the question.

Barber, in reply.

STIRLING, J., stated the facts of the case, and observed that, according to the decisions, it was clear that before the transactions of 1883 the brewery company had no right to consolidate their mortgages as against the Plaintiff or Messrs. *Ind, Coope, & Co.*, whom he represented; and that the clause in the mortgage deed of 1883 as to the consolidation of mortgages simply had the effect of sweeping away the restriction imposed by the *Conveyancing Act* of 1881, and leaving the parties in the same position as if that

(1) 6 App. Cas. 698. (2) 19 Ch. D. 630.

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Act had not been passed. It did not have the effect of extending in any way any right of consolidation which the brewery company might have had. His Lordship then proceeded, after referring to the memorandum signed in 1883:—

Now it is clear that the effect of that memorandum was to prevent the brewery company, the first mortgagees, from claiming anything beyond the £2300, notwithstanding the proviso for redemption contained in their mortgage. It also appears to me that the brewery company never dreamed, and that no party to the arrangement ever dreamed, that the brewery company would acquire any right of consolidation which they had not under the previous mortgage, and that the whole transaction was simply intended to confer upon the brewery company a right to the £2000 and to other money which might become due, not exceeding in the whole the sum of £2300. In my opinion, not only would Mr. *Blumson*, and Messrs. *Ind, Coope, & Co.*, and Messrs. *Booth & Co.*, have been very much astonished if it had been suggested to them that the brewery company were acquiring a right to tack on to the charge created by their mortgage deed any other debt which might be imperfectly secured by any other security; but the brewery company would have been much surprised if such a suggestion had been made. It appears to me, as the result of the evidence, that the real and true agreement between the parties was that the brewery company were not to acquire any fresh right of consolidation, and if they had been defendants in this action they could not have been heard to insist upon any such right of consolidation in respect of the mortgage on the *Duke of York*.

If that be so, there is very little more to be said. On the 10th of September, 1883, both the securities were transferred to the present Defendant. Is he in any better position than the brewery company? It is quite clear that the right to consolidate is an equitable right, for which proposition I shall cite a single sentence of Lord *Selborne* in *Jennings* v. *Jordan* (1): "A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may, within certain limits, and against certain persons (entitled

(1) 6 App. Cas. 698, 700.

to redeem all or some of them), 'consolidate' them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all." It is there treated as an equitable right, and it is so referred to throughout the judgment of Mr. Justice *Fry* in the case of *Harter* v. *Colman* (1). Then being an equitable right, it follows that the ordinary incidents of equitable rights must attach to it; and one of them is that the assignee of an equitable right stands in no better position than his assignor, assuming always that none of the parties had done anything which would mislead in any way the persons claiming under the assignment, or been guilty of any such conduct as would set up counter equities, so to speak, against the person claiming the right.

In this case the matter stood thus. On the 6th of February, 1883, as I have already said, the present Plaintiff had a right as against the brewery company to redeem the *Union* public-house without at the same time redeeming the *Duke of York*. It is admitted that he did nothing which could in any way, as between him and the present Defendant, affect that right; and that being so, Mr. *Wenn*, the Defendant, has simply got by assignment the equitable rights of the brewery company, and can stand in no better position than theirs. As in my opinion they could not have compelled Mr. *Bird* to redeem both properties, so neither can Mr. *Wenn*.

It therefore follows that Mr. *Bird* is in this action entitled to redeem the *Union* without also redeeming the *Duke of York*; and there will be a declaration to that effect.

There only remains for me to dispose of the question of costs. It is only in a rare case that costs ought to be given against a mortgagee who brings forward a case which is fairly open to argument. This rule was established, I think, by the decision of the Court of Appeal in *Smith* v. *Watts* (2), and I see no reason to depart in this case from that rule. Each party will add his costs to his charge.

Solicitor for Plaintiff: *H. Tyrrell.*

Solicitors for Defendants: *G. Noon; Angell, Imbert-Terry, & Co.*

(1) 19 Ch. D. 630.

(2) 22 Ch. D. 1.

C. M.

STIRLING, J.

1886

June 30.

REID *v.* REID.

[1883 R. 1795.]

Husband and Wife—Equity to a Settlement—Misconduct—Whole Fund.

A wife was entitled to about £1500. The husband had disregarded an order of the Court for restitution of conjugal rights, and stated that he and his wife should not again live together :—

Held, that the conduct of the husband amounted to aggravated misconduct, and that under all the circumstances of the case the whole fund was to be settled on the wife and children.

THE Plaintiffs, *Caroline Jane Reid* and *George Reid*, were married in October, 1871, without any settlement. By an indenture dated the 21st of December, 1874, certain property at *Leicester* was conveyed to trustees on trust to sell the same and to apply the rents until sale as thereinafter mentioned. And by the same indenture two sums of £2000 and £1327 were assigned to the trustees on trust to raise the sum of £1000, and pay the same to *Caroline Jane Reid;* and subject thereto to pay the income of the trust premises to *Eliza Rodhouse* (mother of *Caroline Jane Reid*) for life, and after her decease to raise two sums of £1000 each for *W. H. Rodhouse* and *A. H. Rodhouse*, and to hold the residue of the said trust premises in trust for *Caroline Jane Reid*, *W. H. Rodhouse*, and *A. H. Rodhouse* in equal shares as tenants in common.

The £1000 directed to be paid to *C. J. Reid* had been raised and paid to her husband *George Reid.*

Eliza Rodhouse died in February, 1883.

Caroline J. Reid brought this action against her husband and the trustees of the settlement claiming that the whole of the property to which she was entitled under the settlement might be settled on the usual trusts in favour of her and her children.

The circumstances are fully stated in the judgment of the Court.

Barber, Q.C., and *Colt*, for Mrs. *Reid* :—

The doctrine of an equity to a settlement prevails in this case, and we ask the whole fund to be settled. The old rule of settling one half is not now followed : *Boxall* v. *Boxall* (1).

(1) 27 Ch. D. 220.

Daniel Jones, and *Ram*, for the husband :—

It must be a very gross case to induce the Court to depart from the rule as to one half. There is no evidence of any actual misconduct on the part of the husband. Mere quarrels are not enough: *Eedes* v. *Eedes* (1); *Macqueen's* Husband and Wife (2); *In re Suggitt's Trusts* (3).

Mr. *Reid* appeared as a witness, and the effect of his evidence is stated in the judgment of the Court.

Swinfen Eady, and *F. Thompson*, for other parties.

Barber, in reply.

STIRLING, J.:—

This case is one in which a wife asks the Court to make upon her a settlement of certain property to which she is entitled under the will of her father and under a deed of family arrangement with reference to her father's estate.

The circumstances under which the case comes before the Court are these. The lady married her husband so far back as the year 1871, and the husband and wife lived together down to the year 1883. Then the lady went to *Leicester* to live with her mother under circumstances which have not been brought before the Court, but it appears that while she was there a correspondence took place with reference to a separation, and in that correspondence the husband stated in a most distinct and emphatic manner that he and his wife should not live together again. The result of that was that proceedings took place in the Divorce Court, and on the 13th of June, 1884, a decree was made by the Judge of that Court in favour of the wife, ordering restitution of conjugal rights. That order was made, as admitted by the husband, in his presence. Consequent upon that order the wife went down to a house at *Croydon*, which was at that time the home of the husband. The husband said in the witness-box that she got into the house by stratagem and that she was accompanied by their child, and he admitted that though the order was made in his presence and he knew of it he turned her out of the house, alleging by way of excuse that the order had not

(1) 11 Sim. 569. (2) 3rd Ed. p. 49. (3) Law Rep. 3 Ch. 215.

STIRLING, J. 1886 REID v. REID.

been formally served upon him. Next he broke up the home at *Croydon*, and in this Court to-day on re-examination he gave as the reason for so doing, charges against his wife which I must assume to have been completely disposed of on the trial of the application for restitution of conjugal rights. Having on these grounds broken up his home, he invited his wife to live at an hotel in *London*, and there they lived for six weeks. Then he took rooms at an hotel in *Brighton*. Apparently the wife refused to go with him there, and on the 14th of April, 1885, an application was again made to the Divorce Court. That application was grounded upon this, that the husband had not complied with the order of the 13th of June, 1884. An order was made directing an inquiry into the means of the husband, which inquiry is still pending. The husband was to-day referred to letters which passed between him and his wife in the year 1883. He is asked if he is in the same mind still, and he admits that he is. What is the conclusion which the Court must draw from those facts? That the husband is persisting, in spite of the order of the 13th of June, 1884, in disobeying the order, and for reasons proved by that order to be groundless. The husband is not only guilty of misconduct, as it seems to me, but of aggravated misconduct. That is one element which I think I must take into consideration in the mode in which I shall deal with this case.

Then as regards the fund. The income of the fund is about £60 a year. The *corpus* consists of real estate of which there is a trust for sale. It is stated, and the statement is not contradicted, that it has been twice offered for sale. The highest bid obtained was £4000, and the value put on the property is £5000, and it is now suggested that possibly £6000 might be got for it under circumstances which may or may not happen, and which might possibly lead to an increase of value. It is also to be borne in mind that the husband has already received £1000 out of the wife's fund.

Under those circumstances, as it seems to me, I cannot fairly assume that the income of her share is more than £60 a year, or that the value of the *corpus* is more than £1500. It is admitted that one-half of the £1500 must be settled, and the question is, whether in the discretion of the Court, having regard to all the circumstances, the whole fund ought not to be settled.

It is true that technically speaking the case does not fall within the precise terms used by Lord *Cairns* in the case of *In re Suggitt's Trusts* (1); but it seems to me that reading his judgment fairly he was dealing there only with specific instances of conduct on the part of the husband which would lead the Court to settle the whole fund, and it seems to me that those cases might be truly summed up in the term "aggravated misconduct on the part of the husband." Now legal misconduct on the part of the husband there certainly is, because he has failed to perform that which the law regards as the husband's duty, namely, to provide a home for his wife. Aggravated misconduct there is, I think, having regard to the evidence which has been given by him in the box this day. Therefore it seems to me that it falls under the class of cases of which various instances are given by Lord *Cairns* in the case above mentioned. I bear in mind that the temporary alimony which is allowed by the Probate Court comes exactly to the sum of £60 per annum. I also bear in mind this,—that at the time when the husband and the wife separated, he allowed her £120 a year. The husband will do nothing for the wife beyond that which the law compels him, and on the whole it seems to me that this is a case in which I ought to settle the *corpus* of the whole fund, directing the future income of that fund to be paid to the wife from the date of the order. I come the more readily to that conclusion, because the whole question of the allowance to be made by the husband to the wife will shortly come before the Judge of the Probate Court, and no doubt he will take into consideration the effect of this order. [His Lordship then disposed of a question raised as to the arrears of the allowance.] Of course the costs of the trustees must be paid out of the fund. I shall certainly not after the evidence of the husband here to-day allow him any costs, and of course the wife will take her costs out of the fund.

Solicitors for Mrs. *Reid: Pattison, Wigg & Co.*

Solicitors for Mr. *Reid: Gedge & Co.*

Solicitors for other parties: *Indermaur & Brown; Robins, Cameron, & Kemm.*

(1) Law Rep. 3 Ch. 215.

STIRLING, J.

1886

July 14.

DAMANT *v.* HENNELL.

[1885 D. 908.]

Costs—Next Friend—Solicitor and Client—Reversion.

When the costs of infant Plaintiffs suing by their next friend are directed to be paid out of a fund in Court to which the infants are entitled in reversion, party and party costs only will be immediately paid; the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client when the fund comes into possession.

UNDER the settlement made on the marriage of *F. W. S. Damant* a sum of £2000 was, after the death of the husband and wife, to go to the children of the marriage as the husband and wife, or the survivor, should appoint, and in default of appointment to such of the children as being sons should attain the age of twenty-one years, or being daughters marry or attain that age. The wife was dead. The trustees of the settlement lent the money to *F. W. S. Damant* and his wife, and it was lost. The two children of the marriage were infants, and brought by their next friend an action against the surviving trustee and the executors of a deceased trustee for the recovery of the money.

By the judgment in the action it was ordered that the surviving trustee should pay into Court £2005 consols, out of which the costs of the Plaintiffs when taxed were to be paid.

The Plaintiffs now asked, on a motion to vary minutes, to have their costs taxed as between solicitor and client.

Barber, Q.C., and *Ryland*, in support of the motion:—

The rule is that a next friend has his costs as between solicitor and client: *Morgan* and *Wurtzburg* on Costs (1).

Warmington, Q.C., and *C. Healey*, for the Defendants:—

That rule is only as between the next friend and the infants. Here the Plaintiffs are only entitled in reversion.

STIRLING, J., said that where the fund belonged entirely to the infants, the next friend was entitled to have his costs, charges,

(1) Page 353.

and expenses out of the infants' fund, but no authority had been cited to shew that that rule applied when the fund was not absolutely the infants'. In the present case it seemed to him that the next friend could only get his costs as between solicitor and client when some of the fund came into possession.

Cur.—Costs of Plaintiffs to be taxed as between solicitor and client: the Taxing Master to distinguish which of such costs are party and party. Next friend to have his party and party costs out of the fund with liberty to apply for the difference when there is a fund to which the Plaintiffs are absolutely entitled.

Solicitor for Plaintiffs: *M. Hawkins.*

Solicitors for Defendants: *Sole, Turner, & Knight.*

C. M.

C. A.

1886

March 25, 26, 27; *April* 5.

TAYLOR *v.* MOSTYN.

[1881 T. 77.]

Foreclosure—Mortgage of Coal Mines—Mortgagee in Possession—Accounts—Value of Coal improperly worked—Deductions—Costs of Severance—Costs of Raising—Damage to Mines subsequent to Foreclosure Judgment—Adding Accounts and Inquiries after Judgment—Rules of Supreme Court, 1883, *Order* XXXIII., *r.* 2.

The Plaintiffs were mortgagees in possession of a colliery, and were also treated by the Court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery and gave their sublessees permission to work and remove the pillars, which they did:—

Held, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sublessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; and the foreclosure, which had been made absolute before the appeal was heard, was reopened.

Livingstone v. *Rawyards Coal Company* (1) distinguished.

Some time after judgment *nisi* for foreclosure, which directed accounts against the Plaintiffs as mortgagees in possession, but contained no inquiry or direction as to improper working of the collieries, it was discovered that the mines had been flooded in consequence, as the mortgagors alleged, of the improper working of the mortgagees or their sublessees in removing the pillars.

The mortgagors applied to have under the foreclosure judgment as it stood an inquiry with reference to the flooding, and to charge the mortgagees with the injury so caused:—

Held (reversing *Bacon*, V.C.), that although the application was wrong in form, as such an inquiry should have been obtained through a supplemental judgment, or by an addition to the existing judgment, yet as a probable case had been made out of serious damage to the mortgaged property by the acts of the mortgagees in possession, the mortgagors should not be absolutely foreclosed and left to the remedy of an action against the mortgagees, or on the covenants of the lease against the lessees, but were entitled to such an inquiry, and in taking the accounts to charge the mortgagees with the amount of the injury;

And the Court, in order to settle the question cheaply and expeditiously,

(1) 5 App. Cas. 25.

directed a reference to ascertain whether the flooding had been caused by the improper working by the mortgagees or lessees or any persons acting by their permission—and if so what was the amount of loss or damage caused thereby—and added a direction that the mortgagees, in taking the accounts directed by the foreclosure judgment, should be charged with the amount of such loss or damage.

BY a judgment in this action, dated the 16th of May, 1882, subsequently affirmed on appeal, the Court declared that by an indenture of mortgage, dated the 8th of December, 1843, a valid lease of certain collieries, coal mines, seams of coal and ironstone, known as the *Mostyn* Collieries, had been granted, and that the term of ninety-nine years thereby created was subject to the payment of all moneys due on the security of that indenture and of an indenture of the 26th of April, 1850, and directed (among other accounts) an account of what was due to the Plaintiffs (who had become transferees of the two securities) as mortgagees under and by virtue of the said indentures respectively; an account of rents and profits of the hereditaments comprised in the said indentures received by the Plaintiffs or their predecessors in title as mortgagees in possession with consequent directions for redemption or foreclosure.

On the 10th of May, 1850, a lease had been granted by the then Lord *Mostyn*, under the power of leasing contained in his father's will, of the same mines to a trustee for the then mortgagees for a term of forty years, subject to payment of a yearly rent of £1500, and also in addition to that yearly rent a royalty of one-twelfth of the amount of the royalty to be paid on coal not covered by the £1500 (1). The lease contained covenants by the lessees to work the coal, &c., in a fair, regular, proper, and workmanlike manner—and also covenants that the pillars of coal to be left in the mines for the support of the roofs of the coal therein should not be worked or wrought without the consent in writing therein specified first had and obtained, and a covenant at all times during the demise to leave substantial, good, and sufficient walls and pillars for the support of the roof, and not remove the same or any part thereof without the consent in writing therein specified first had and obtained.

(1) This was the construction put upon a very obscure clause in the lease by the Court on this appeal.

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After various assignments, the mortgage-debt secured by the deeds of the 8th of December, 1843, and the 26th of April, 1850, was by indenture of June, 1880, assigned to *Robert Lancaster* in trust for the Plaintiffs, and the collieries and premises were assigned to *H. E. Taylor* for the residue of the ninety-nine years, and to *Robert Lancaster* for the life of Lord *Mostyn* in trust for the Plaintiffs, subject to the equity of redemption in the collieries under the deeds of December, 1843, and April, 1850, and the lease of the 10th of May, 1850, was assigned to the Plaintiffs.

By deed of the 17th of December, 1880, the collieries were demised by the Plaintiffs and by *R. Lancaster* and *H. E. Taylor* to *J. Lancaster* and *Thomas Story*, for a term of twenty-one years from the 31st of December, 1879. By the terms of this underlease the underlessees were authorized to work the existing pillars of coal below a certain level, known as the "130 yards level," and to work such of the mines as were below that level without leaving any walls or pillars.

The action has been before the Court in various stages: see the report, 23 Ch. D. 583, *et seq.*, where the deeds above mentioned are set forth at considerable length, and see 25 Ch. D. 48.

In 1884 it was discovered for the first time that the mines comprised in the mortgage security had been flooded, and, as the Defendants alleged, irretrievably injured. The flooding had, according to the Defendants' contention, arisen in consequence of the improper working of the mortgagees who were in possession, or of their sublessees under the lease of the 17th of December, 1880, by removing the pillars of coal, the effect of which was to cause an inundation of the sea.

A summons was accordingly taken out by the Defendants—Lady *Henrietta Augusta Mostyn*, *R. T. Cust*, and the Hon. *Ralph Pelham Nevill*, on the 17th of March, 1885, asking that in taking the accounts directed by the judgment of the 16th of May, 1882, the Plaintiffs and their personal representatives might be charged with an amount equal to the damage which had been sustained by the hereditaments comprised in the said indentures of the 8th of December, 1843, and the 26th of April, 1850, in consequence of the inundation by the sea caused by the improper workings of the Plaintiffs and their sublessees, and by the

breaches by them of the covenants on the lessees' part contained in the lease of the 10th of May, 1850, and that the question whether the said inundation was caused by such improper workings and breaches of covenant, and of the amount of damages caused thereby to the said hereditaments, might be decided on oral evidence to be taken before a Judge in Court or otherwise upon the trial of an action, and that proper directions might be given.

The summons being adjourned into Court, the Defendants produced an affidavit by a mining engineer, who attributed the flooding to the reckless working of the mines, in not leaving sufficient pillars for the support of the roof and in removing other pillars, and in working out the coal right up to the bed of the river *Dee*. The Plaintiffs (the mortgagees) did not upon the summons in any way answer this affidavit; but treating the application as informal and improper, adduced no evidence on their behalf.

On the 15th of July, 1885, the summons was heard and dismissed, and on the same day an order was made upon a question submitted to the Court by the Chief Clerk, by which the Plaintiffs were held liable to pay on the pillars of coal removed only the royalty of one-twelfth. Against these orders the Defendants gave notice of appeal on the 7th of August, 1885.

The Chief Clerk by his certificate, dated the 30th and filed the 31st of July, 1885, found that there was due to the Plaintiffs, as mortgagees, for principal and interest, a sum of £177,610 2*s*. 8*d*.

That the Plaintiffs and their predecessors in title had, since the 10th of May, 1850, received rents and profits to the amount of £87,244 3*s*. 8*d*. and that no wilful default had been established against them, and that deducting the last mentioned sum there remained a sum of £90,365 19*s*. due to the Plaintiffs under their mortgage security.

The Defendants took out a summons in the Chambers of Vice-Chancellor *Bacon*, asking that the certificate might be discharged or varied as follows (*inter alia*), viz.:

1. By charging the Plaintiffs and their predecessors in title with an amount equal to the damages which had been sustained to the mortgaged hereditaments in consequence of the inunda-

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tion of the sea, caused by the improper workings of the Plaintiffs and their predecessors and sublessees, and by the breaches by them or some of them of the covenants contained in the indenture of lease.

2. By charging the Plaintiffs and their predecessors with the following amount (*inter alia*):—

D. An amount to be ascertained on the footing that the Plaintiffs are chargeable with more than one-twelfth of the value of coal gotten by the working of the pillars in breach of the covenants contained in the said indenture.

On the 6th of November, 1885, the Vice-Chancellor dismissed the summons with costs.

The Defendants, on the 18th of November, 1885, gave notice of appeal against the order of Vice-Chancellor *Bacon*, and by both these notices of appeal asked for the same relief as that sought by the above-mentioned summons to vary the Chief Clerk's certificate.

The points above mentioned, 1 and 2, D., are the only two calling for a report.

Hemming, Q.C., and *Haldane*, for the Appellants:—

The Plaintiffs have wrongfully taken our coal by removing, or allowing their sublessees to remove, the pillars of coal which, by the covenants in the lease they were prevented from removing. The Plaintiffs and lessees, in fact, are the same persons, and they cannot be allowed in their character of mortgagees to do that which as lessees they have no right to do. They are consequently, as regards this coal, trespassers, and must account for the value of the coal abstracted as at the pit's mouth, without being allowed the costs of getting and severing it: *Llynvi Company* v. *Brogden* (1).

[BOWEN, L.J., referred to *Jegon* v. *Vivian* (2).]

There the Lord Chancellor went rather upon the special circumstances of the case, the defendants having acted reasonably in the *bonâ fide* belief in their title to the coal worked. But here the working was obviously improper and in distinct breach of their covenants.

(1) Law Rep. 11 Eq. 188. (2) Law Rep. 6 Ch. 742, 760

Livingstone v. *Rawyards Coal Company* (1) will be cited against us, but that again depended on its special circumstances.

As mortgagees in possession the Plaintiffs are liable for the deterioration of the mortgaged property occasioned either by gross or wilful negligence, or mismanagement, or acts equivalent to waste: *Sandon* v. *Hooper* (2); *Wragg* v. *Denham* (3); *Perry* v. *Walker* (4). Then the Court has ample jurisdiction to direct the account and inquiry sought by the Defendants as to the damage caused by the inundation, although it happened after the foreclosure decree: Rules of Court, 1883, Order XXXIII., rule 2.

[*Mayer* v. *Murray* (5) was also referred to.]

Marten, Q.C., and *J. Dixon*, for the Plaintiffs:—

Livingstone v. *Rawyards Coal Company* is a clear authority that the value of the coal taken must be its value to the person from whom it is taken at the time of taking—and there the principle of *Jegon* v. *Vivian* (6) is sustained.

If the lessees and mortgagees had been separate persons in fact, as they are in interest, the two characters could not be mixed up together, nor can they be now. They are not responsible for the flooding in their character as lessees. In all the cases cited on the other side as to the liability of the mortgagee in possession, the mortgagee himself committed waste, which is not the case here. No complaint was made in the action as to any improper working by the Plaintiffs. This account could not have been directed against the Plaintiffs under the original decree, and it cannot be directed now. A judgment for foreclosure is no bar to any action that might be brought by a mortgagor. So the mortgagors will not be prejudiced.

[They also referred to *Smith* v. *Great Western Railway Company* (7).]

Hemming, in reply.

(1) 5 App. Cas. 25.
(2) 6 Beav. 246; S. C. on appeal, 14 L. J. (Ch.) 120.
(3) 2 Y. & C. Ex. 117.
(4) 1 Jur. (N.S.) 746.
(5) 8 Ch. D. 424.
(6) Law Rep. 6 Ch. 742.
(7) 3 App. Cas. 165.

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March 27. THE COURT on this day gave judgment on some of the points raised by the appeal, but reserved judgment upon the question of adding further orders after foreclosure judgment.

COTTON, L.J. (after dealing with other points raised by the appeal, continued):—

There were provisions in the lease that the pillars should not be worked, and there was an underlease granted by the lessees who were the same persons as the mortgagees, and the lessees granted licenses to the underlessees to work away the pillars. Upon the coal worked away from the pillars what the mortgagees have been charged is one-twelfth, the amount of the royalty to be paid on coal not covered by the £1500. But the Appellants contend that that is wrong, and that they ought to be charged with the value of the coal. In my opinion that contention is right. The lessees or mortgagees had no right to take away that coal contained in the pillars. It is said on the other hand that the lessees and mortgagees were different people, and that the mortgagees therefore must be regarded as entirely different and distinct from the lessees, and that they can only be charged with what they ought to have got from the lessees, having regard to the rent and royalties reserved by the lease. In my opinion that is fallacious. The lessees and mortgagees were distinct and separate in this sense only, that the mortgagees are not to be charged with any benefits which the lease secures to the lessees, so that they can put it into their own pocket; but the lessees and mortgagees were practically the same persons, because the lessee was a trustee originally of the mortgagees, and we must consider the mortgagees represented by their trustee as lessees, and except so far as the lease secures to the mortgagees certain benefits to be put into their own pockets as lessees, they, in my opinion, ought to be charged with what they received, either as mortgagees or lessees, independently and in contravention of the terms of the lease. It is said they did not receive this. Very true; but they licensed their underlessees to receive it by working this coal, and, therefore, in my opinion, in taking the account against them as mortgagees, as they authorized their sublessees to take this coal,

which was a benefit not given them by the lease, because they were prohibited by the lease from taking this coal, they ought to be charged with the value of that coal (what value I will presently explain), just as much as if they had first received it. It is what, without wilful default, they might have received.

Now, what sum ought they to be charged with? They must be allowed all the costs of bringing the coal to the surface, but, as they worked it wrongfully, contrary to the provisions of the lease which they held, they must be charged with the value of it without allowing for working the coal, that is, severing it from the mine, which, under the contract, they were bound not to do. That, I think, is the true result of the cases, which I will not go into, because they have been discussed often by this Court. Perhaps I ought to mention one case, and merely to say that in my opinion we are not bound by it. I mean the case which was referred to in the House of Lords of *Livingstone* v. *Rawyards Coal Company* (1). That was a Scotch case, and it was a very peculiar one, because there the party claiming damages for the wrongful taking of the minerals was the owner of a little bit of coal which by itself could never have been worked, being situated in the midst of other mines, and quite surrounded by them, having no shaft in it. Therefore it could not be worked, and the owner was in this position, that if his neighbour had not taken it, he never could have got for that coal or for a license to work that coal more than the House of Lords gave him, which was not the value of the coal when severed from the mine, but only the royalty which his own witness said he could have got for the coal. That was entirely different from this. Here there was a shaft down to the coal, and because the coal was all worked out there was nothing to prevent the pillars being taken.

BOWEN, L.J.:—

I agree.

FRY, L.J. (after discussing the other points, proceeded):—

I then come to the point, with relation to the pillars. It appears to me with regard to all the pillars below the 130 yards'

(1) 5 App. Cas. 25.

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level there was a distinct license conveyed by the sub-lease to the sublessees to work those pillars, and there is no distinction attempted to be drawn between pillars above that level and pillars below, and we must treat it on the present occasion as the same. The result is that these pillars have been won by the authority of the mortgagees. It was a wrongful act on their part to grant the authority, and they must be responsible for the value of the coal so abstracted, subject of course to the usual deduction for the costs of bringing it to the surface, but not the cost of severance.

On the 5th of April, 1886, judgment was delivered on the point reserved.

1886. April 5. COTTON, L.J.:—

The point on which we reserved our decision arose with reference to a fact which became known long after the judgment directing the accounts in the foreclosure action to be taken. In 1884 it was found that the mines which were comprised in the mortgage had been flooded, and it is feared irretrievably, for they cannot be freed from water. There was no direction in the decree as regards improper working, by which it is suggested that this flooding was caused; but an application was made by the Defendants, who are entitled to the equity of redemption, by no means in the regular form, to have, under the judgment as it stood, an inquiry with reference to the flooding, and seeking under the judgment as it stood to charge the mortgagees, the Plaintiffs, with the injury so caused to the mine. In my opinion that was wrong. The proper course would have been to have sought, either by a supplemental judgment, or by addition to the existing judgment, some inquiry which would make the Plaintiffs liable for the injury to the mine if it was caused in fact by them, or by any one acting with their permission; therefore that was wrong in form. Now several questions were raised upon this point. It was contended that the mortgagees were not to be held liable for this, and then it was said that the application being wrong we ought not now to give any relief to the Defendants, who are entitled to the equity of redemption. But in my opinion, notwithstanding that the application was wrong in form

and somewhat late, we ought not absolutely to foreclose those who are entitled to the equity of redemption if there is a probable case made out that the mortgaged property has been seriously injured by the mortgagees in possession. Although there might be an action against the mortgagees, or against the lessees under the covenant, yet that is a very different thing from directing an inquiry whether damage has been caused to the mine, if there is a probable case made out that that damage has been due to the acts of the mortgagees. In my opinion, if the mortgagees by any act of theirs seriously damaged the property in mortgage, those mortgagees in possession are answerable in this sense, that they must be charged with any damage or loss to the property which has been caused by their improper conduct, that is to say, by their wilful default. Therefore the question we have to consider is what we ought to do in this case—whether there is any probable case made out as against the mortgagees, the Plaintiffs.

The mortgagees have also got a lease. I say the mortgagees, because, although the lease was not to the same persons as the mortgagees, yet it was a lease granted to a trustee for the mortgagees, and the mortgagees must be answerable in any account like this, not as lessees but as mortgagees in respect of any benefit which they have got which is not given to the lessees by the lease, and for any improper working by the lessees or those acting for the lessees in contravention of the lease. This summons and application asked for an inquiry what damage had been sustained by the Defendants in consequence of the inundation of the mine by the River *Dee*, caused by the improper workings of the Plaintiffs and their sublessees, and by the breaches by them of the covenants on the lessees' part contained in the indenture of lease. Then it asked that that question might be decided in a particular way. That was supported by an affidavit of Mr. *Griffiths*, a mining engineer, who had been inquiring into the state of the mine previously and the state of the workings, and there was a previous affidavit shewing what his means of knowledge were. He refers to the flooding, and the affidavit itself is not very satisfactory. He says it would be impossible to work the mine again, and then he says:—"I am of opinion that

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the inundation was caused by improper and reckless working, in not leaving good and sufficient pillars for the support of the roof, in removing pillars or portions of pillars, and in carrying the works up into dangerous, and as the result shews, fatal proximity to the bed of the superjacent river." That is certainly not very satisfactory, and does not establish a case as against the mortgagees. But that was not in any way answered. The mortgagees thought it right to say:—"This is an informal application, and one which in such an action as this ought not to be granted; we are not answerable in any way for it," and that view was acquiesced in by the Vice-Chancellor. I have already stated my opinion, that if there is a reasonable case for supposing that the mortgagees have caused damage to the property, that ought to be put into a course of inquiry, and I think, although there is not a case established against them here, yet there is enough to entitle those who have the equity of redemption to an inquiry. I say there is a *primâ facie* case, for this reason—the mortgagees or their sublessees have been working these mines. We know that the mortgagees authorized the removal of the pillars which under the mining lease the lessees cannot remove. Whether this inundation was caused by that or not we do not know. But we also know that these mines, which have been worked for some time without any incursion of water, were in 1884 flooded in such a way that apparently there is no chance of working them again. As the mortgagees have not thought fit in any way to answer this affidavit, or in any way to explain what they say was the cause of this inundation, in my opinion there is such a case made out that we should not be justified in letting the foreclosure become absolute, if the persons entitled to the equity of redemption are willing to prosecute and make out their case against the mortgagees before that is done. In my opinion it ought to be ascertained whether this inundation has been caused by any improper working by the mortgagees or lessees, or by persons acting by authority from them, and if so, what is the injury to the estate, and that in taking the accounts, if it is shewn that there is injury resulting from the acts of the mortgagees (for I call the acts of the sublessees their acts), then they ought to be charged with it.

Now, how is that to be done? The application was made somewhat late, and was made in an informal manner by the persons entitled to the equity of redemption, and we ought to take care that there is no delay occasioned to the mortgagees if they are ultimately entitled to a decree of foreclosure. Therefore, what we all think is the proper course, and the one which will solve this matter with least expense and delay, is this: that there should be a reference either to a mining engineer, with the assistance of a barrister as assessor, or a reference to a barrister with the assistance of a mining engineer, to ascertain whether the flooding of the mines comprised in the Plaintiffs' mortgage has been caused by any improper working by the mortgagees or lessees or any persons acting by their permission or authority, and, if so, what is the amount of loss or damage caused thereby to the said mines; and then we propose to add this: let the mortgagees, in taking the account directed by the judgment, be charged with the amount of such loss or damage. I say that that will be the most expeditious and the best way of dealing with this matter, because it would not be satisfactory to send the matter to be inquired into before the Chief Clerk. A mining engineer must be either the referee, or the assessor of the referee if the referee is to be a legal referee, and therefore it would be wrong to send it to Chambers to be inquired into. If the mortgagees object to that form of reference they must take the consequence of any delay that may arise from our taking another course, which, if they dissent from what we have suggested, we shall do; but we shall not give the Defendants, the owners of the equity of redemption, any option of objection, because they have come here very late in the day, and have come here upon imperfect evidence as against the mortgagees. We only give the mortgagees the option of accepting this if they are willing the matter should be tried in this way, which we consider the most expeditious, least expensive, and most certain way of ascertaining the truth.

BOWEN, L.J.:—

I entirely agree with what Lord Justice *Cotton* has said, and I have nothing to add.

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FRY, L.J.:—

I also entirely agree with the propriety of the course which has been suggested.

The mortgagees accepted the reference.

Solicitors for Appellants: *Law, Hussey, & Hulbert.*
Solicitors for Plaintiffs: *Gregory, Rowcliffes, & Co.*

M. W.

C. A. 1885 CHITTY, J. *Nov.* 13, 20. C. A. 1886 *March* 30; *April* 8.

HARRIS *v.* DE PINNA.

[1885 H. 3944.]

Prescription Act (2 & 3 *Will.* 4, *c.* 71) [*Revised Ed. Statutes, vol. vii., p.* 223] —"*Building*"—*Structure for storing Timber—Easement—Ancient Lights —Air—Unity of Possession.*

Per Chitty, J.:—The words "other building" used in the *Prescription Act* (2 & 3 Will. 4, c. 71), s. 3, in connection with "any dwelling-house, workshop—" mean some building of a like character with a dwelling-house or workshop, and will not necessarily include every structure which may be a building for the purposes of the *Metropolitan Building Acts.*

Accordingly a permanent structure used for storing and seasoning timber and shewing it to customers, which consisted of upright baulks of timber or standards fixed in stone bases built on brick piers, with cross-beams and diagonal iron braces, divided into floors or stagings with open unglazed ends or apertures between the uprights, and served for drying the timber and also for admitting light, is not a "building" within sect. 3, so as by twenty years' uninterrupted enjoyment of the access and use of light to and for the apertures to have acquired an absolute and indefeasible right thereto:—

And (*per* C. A.) in order to acquire an absolute and indefeasible right to light under sect. 3, it must be shewn not only that there has been an uninterrupted access of light to the building in respect of which the easement is claimed, but also that the light has reached the building by one and the same definite channel for the statutory period. Without therefore deciding whether the particular structure was a "building" within the *Prescription Act*, sect. 3:—

Held, that as from the nature of the structure and the mode of carrying on business timber would be so piled as from time to time to block up one or other of the apertures so that the Plaintiffs could not prove that there had been an uninterrupted access of light by any one aperture for the statutory period, their claim to an easement failed.

A right by way of easement to the uninterrupted access of air not coming

by any definite channel but over the general unlimited surface of the alleged servient tenement cannot be acquired under the *Prescription Act*, sect. 2, by mere enjoyment for the statutory period; and the fact that the alleged dominant and servient tenements were both held under a common lessor, either of itself, or at any rate when coupled with the fact that the lease of the servient tenement was the earlier, negatived any claim to the easement as arising out of implied covenant.

THE Plaintiffs, who were timber merchants, and the Defendant occupied adjoining premises abutting on *Wilson Street* and *Earl Street, Shoreditch*, under leases for ninety-nine years granted by *Samuel Paynter*, the freeholder, to *John Harris*, grandfather of the Plaintiffs, in 1833, and to the Defendant's predecessor in title in 1831. Shortly after obtaining his lease, and before 1843, *John Harris* erected on the demised land structures or timber stages for storing and seasoning timber, and also for the purpose of exhibiting it to customers. These structures, which consisted of several floors or stages, were substantially constructed with solid baulks of upright timber or standards fixed in stone bases built on solid brick piers. The standards were tied together by longitudinal baulks or cross-beams, which supported floors or stages of solid planks, and were also connected by diagonal braces. The topmost floor was so constructed as to serve either as a roof or as an additional staging for timber. The structures were left open on the sides abutting on the Defendant's premises for the purpose of admitting light and air, which came to the Plaintiffs' structures over an open yard at the back of the Defendant's premises before the building operations complained of in this action, through the above-mentioned openings. *John Harris* had also before 1843 erected a "traveller," on which a moveable crane passed to and fro across his timber stage. This "traveller" consisted of solid timber bearers carried on and framed to solid timber standards which were built on solid brick piers, and the ends or horns of the "traveller" projected over the Defendant's back yard to the extent of about nine inches.

The Defendant was the assignee of the lease of 1831, by which a rectangular piece of land at the corner of *Wilson Street* and *Earl Street*, on which formerly stood 56, *Wilson Street*, and 1 and 3, *Earl Street*, was demised for a term of ninety-nine years. By an agreement of the 2nd of February, 1885, the Defendant

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agreed with the freeholder to pull down 56, *Wilson Street*, and 1 and 3, *Earl Street*, and to erect thereon two warehouses which were to cost not less than £2500, and to be completed within twelve months, in consideration of which building the existing lease was to be surrendered and a lease of the ground granted to the Defendant for a term of ninety-nine years from Christmas, 1884. The Defendant had pulled down the houses and commenced the erection of the warehouses on the site, including the back yard, right up to the boundary of the Plaintiffs' premises, and had proceeded to cut away the projecting horns of the "traveller" and so much of the Plaintiffs' structure as overhung such side.

On the 8th of October, 1885, the Plaintiffs commenced this action for the purpose of restraining the Defendant from proceeding with the erection of his building so as to interfere with the access of light and air from the Defendant's open yard to the Plaintiffs' timber stage, and from interfering with any erections belonging to the Plaintiffs overhanging the Defendant's premises, or from interrupting the use and enjoyment by the Plaintiffs of any easement acquired by them over the Defendant's premises.

It was stated that the Plaintiffs' timber stage could not be pulled down and re-erected for less than £10,000, and that it was most important for the Plaintiffs' business to have an uninterrupted supply of light for the purpose of shewing the stored timber to customers, and also a free current of air for the purpose of drying and seasoning the timber.

On the 14th of October, 1885, the Plaintiffs obtained an interim injunction from the Vacation Judge (*Mathew*, J.), and the motion was renewed before Mr. Justice *Chitty* on the 13th of November, 1885.

Ince, Q.C., and *Jason Smith*, for the Plaintiffs:—

By actual enjoyment without interruption for the full period of twenty years the Plaintiffs have acquired an easement over the Defendant's yard in respect of the access and use of light through the apertures in their timber-stage intended for that purpose. Such timber-stage, which was constructed for permanent use as something in the nature of a workshop in connection

with the business carried on by the Plaintiffs, comes within the words "workshop or other building" in sect. 3 of the *Prescription Act* (2 & 3 Will. 4, c. 71), so as to be capable of acquiring the easement of light.

The mode in which the light has been enjoyed before the obstruction complained of must be considered: *Master* v. *Hansard* (1); *Gale* on Easements (2).

The absence of glass cannot affect the case; glass being a mere incident to the comfortable enjoyment of a house for the purpose of keeping out the wind. A structure of wood similar to this in construction, and, like this, intended to be used as a shop has been held to be a "building" within the *Metropolitan Building Act* (18 & 19 Vict. c. 122): *Stevens* v. *Gourley* (3). So also a structure much less perfect than this has been held to be a "building" for the purpose of giving a vote: *Watson* v. *Cotton* (4). The statute says nothing about the object for which the apertures were made. A house never internally completed for occupation and never actually occupied may acquire the right to the access of light after twenty years: *Courtauld* v. *Legh* (5). The right to the use of light is not limited to domestic occupation but may be acquired for trade purposes: *Martin* v. *Goble* (6), and in respect of apertures not made for the purpose of admitting light: *Garritt* v. *Sharp* (7); and retained in respect of a new building used for entirely different purposes to those of the original building: *Ecclesiastical Commissioners for England* v. *Kino* (8). We have also acquired by prescription at common law a right to the uninterrupted access of air through the apertures of our building necessary for carrying on our business, in the same manner as it has been enjoyed for forty years. The right at law to the uninterrupted access of air over a neighbour's land to an aperture in a dwelling-house or a building occupied for the purposes of trade or otherwise, cannot be disputed, and when infringed gives a right of action just as much as the infringement of light which has been enjoyed as of right: *Hall*

(1) 4 Ch. D. 718.
(2) 5th Ed. p. 198.
(3) 7 C. B. (N.S.) 99.
(4) 5 C. B. 51, 55.
(5) Law Rep. 4 Ex. 126.
(6) 1 Camp. 320.
(7) 3 A. & E. 325.
(8) 14 Ch. D. 213.

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v. *Lichfield Brewery Company* (1); *Dickinson* v. *Harbottle* (2). The words of the Act are wide enough to apply to easements of any kind, and an easement in respect of air can be acquired under sect. 2: *Gale* v. *Abbot* (3); *Dent* v. *Auction Mart Company* (4); *Aldred's Case* (5).

[CHITTY, J., referred to *Webb* v. *Bird* (6) (the *Windmill Case*), as deciding that a claim to the free and uninterrupted access of wind and currents of air cannot be claimed either by prescription or by presumption of lost grant or implied covenant. The result of the Plaintiffs' contention would be to prevent the Defendant from using his land. And the insertion of the word "air" as coupled with light has been most distinctly disapproved by Lord *Selborne* in *City of London Brewery Company* v. *Tennant* (7).]

We submit that where an uninterrupted flow of air through definite artificial apertures from over the Defendant's land has been enjoyed as of right for a sufficient period, a right by way of easement may be acquired, any interference with which is ground for relief in damages: *Bryant* v. *Lefever* (8). The position of the property and all the surrounding circumstances must be looked at: *Sturges* v. *Bridgman* (9). In this case by allowing the Defendant to obstruct or, in reality, wholly to cut off the access of air to the Plaintiffs' premises, the Plaintiffs will be prevented from using their land as they have been accustomed to use it for the statutory period. The fact that Plaintiffs and Defendant both hold under the same landlord will not prevent the Plaintiffs from acquiring an indefeasible right to the easement of light and air as against the Defendant by forty years' uninterrupted enjoyment: *Frewen* v. *Philipps* (10); *Fahey* v. *Dwyer* (11); *Beggan* v. *M'Donald* (12); *Daniel* v. *Anderson* (13). *Bright* v. *Walker* (14) was decided on the twenty years' user (sect. 2), and therefore does not affect this case.

(1) 49 L. J. (Ch.) 655; 43 L. T. (N.S.) 380.
(2) 28 L. T. (N.S.) 186.
(3) 10 W.R. 748; 8 Jur. (N.S.) 987.
(4) Law Rep. 2 Eq. 238.
(5) 9 Rep. 57 b.
(6) 10 C. B. (N.S.) 268; 13 Ibid. 841.
(7) Law Rep. 9 Ch. 212; Seton, 4th Ed. pp. 198, 201.
(8) 4 C. P. D. 172.
(9) 11 Ch. D. 852.
(10) 11 C. B. (N.S.) 449.
(11) 4 L. R. Ir. 271.
(12) 2 L. R. Ir. 560.
(13) 31 L. J. (Ch.) 610.
(14) 1 C. M. & R. 211.

With respect to the horns which project over the Defendant's land: we have been in actual occupation for more than the period of twelve years now fixed by the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), and therefore have acquired by adverse possession the right to restrain the Defendant from carrying up his building so as to interfere with that right, and to that extent to diminish the upward extension of his freehold: *Corbett* v. *Hill* (1).

Romer, Q.C., and *MacSwinney*, for the Defendant:—

The Plaintiffs have not established the right which they claim to an easement for the access of light and air to their timber-stage. First we say that it is not a dwelling-house or workshop, nor is it a building within sect. 3 of the *Prescription Act*. The claim to the uninterrupted access of light to the apertures, not windows constructed for the purpose of admitting light, but mere open spaces for ventilation at the end of the structure, is extravagant, and would impose an enormous and most unreasonable burden upon the adjoining land. And having regard to the fact that these apertures are admittedly at times entirely blocked up with timber, so that no indication to adjoining owners could be given by user that the right would be claimed after twenty years so as to stop building on their land, no claim from uninterrupted enjoyment for the statutory period can be maintained, as there has been no such enjoyment by user as could have become known, and have indicated to adjoining owners that the right was being acquired as against them: *Dalton* v. *Angus* (2). A building within the meaning of the *Prescription Act* must contain actual windows and not merely apertures; and accordingly no right can be acquired in respect of a timber-yard or sawpit: *Roberts* v. *Macord* (3). And if not a building within the Act, then, in the absence of covenant, express or implied, in the lease that the premises demised to Plaintiffs shall be always enjoyed by them as a timber-yard, interference with the access of light and air by a lessee from the same owner will not be restrained: *Potts* v. *Smith* (4). If the Plaintiffs rely on cases decided under the *Metropolitan Building Act*, 18 & 19 Vict. c. 122, we rely equally

(1) Law Rep. 9 Eq. 671.
(2) 6 App. Cas. 740, 760.
(3) 1 Mood. & Rob. 230.
(4) Law Rep. 6 Eq. 311.

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on the earlier *Building Act*, 14 Geo. 3, c. 78, which divides "buildings" in the metropolis into seven different classes, within not one of which can this structure be brought. *Bowes* v. *Law* (1), and *Ecclesiastical Commissioners for England* v. *Kino* (2), also shew by analogy that such a structure as this cannot be regarded as a "building" within the *Prescription Act*. With respect to the alleged diminution of air, it is "only in very rare and special cases involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering:" *City of London Brewery Company* v. *Tennant* (3). *Hall* v. *Lichfield Brewery Company* (4) was in effect dissented from by the House of Lords in *Dalton* v. *Angus* (5). And in any case the claim must be in respect of the particular current of air coming through a definite channel, not, as here, over a large open space: *Scott* v. *Pape* (6).

Secondly, assuming that the easement would be claimed in respect of such a structure, the fact that the servient and dominant tenements are both held under the same freeholder is an answer to the case: *Bright* v. *Walker* (7). A tenant cannot prescribe against his landlord; and, as in this case the Defendant is under a covenant with the common lessor to erect the buildings complained of, his possession is the possession of the lessor, and the Plaintiffs cannot in virtue of their occupation of close *A.*, and in the absence of express or implied contract, acquire an easement over close *B.*, which also belongs to the same landlord: *Gayford* v. *Moffatt* (8); *Fox* v. *Pursell* (9).

[CHITTY, J.:—Those were cases of right of way, which are quite distinct from a claim in respect of the access of light under the *Prescription Act.*]

The enjoyment contemplated by sect. 3 must be an enjoyment for twenty years in the character of an easement as distinguished from the enjoyment of the land itself: *Harbidge* v. *Warwick* (10); *Ladyman* v. *Grave* (11); *Bewley* v. *Atkinson* (12).

(1) Law Rep. 9 Eq. 636.
(2) 14 Ch. D. 213.
(3) Law Rep. 9 Ch. 212, 221.
(4) 49 L. J. (Ch.) 655.
(5) 6 App. Cas. 794.
(6) 31 Ch. D. 554; 34 W. R. 465.
(7) 1 C. M. & R. 211.
(8) Law Rep. 4 Ch. 133.
(9) 3 Sm. & Giff. 242.
(10) 3 Ex. 552, 556.
(11) Law Rep. 6 Ch. 763.
(12) 13 Ch. D. 283.

Even assuming that the Plaintiffs could have acquired an absolute indefeasible right to the access of light over the adjoining land, yet if that land be sold by their lessor without reservation of such right they cannot restrain an obstruction of their ancient lights by the person to whom the land has been sold: *Ellis* v. *Manchester Carriage Company* (1). With respect to the projecting horns, the claim by Plaintiffs to restrict the Defendant from occupying and making use of the land over which they project on the ground that the Plaintiffs have thereby been in adverse occupation for the statutory period is preposterous.

Ince, in reply:—

Frewen v. *Philipps* (2) is a distinct authority that where there has been uninterrupted enjoyment for more than twenty years, the fact that the dominant and the servient tenement are both held under the same landlord does not prevent the acquisition of an indefeasible right to the easement under sect. 3. And when a right to the easement of light has been acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against all the world, and therefore against the owner of the reversion: *Simper* v. *Foley* (3); and cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment; nor is this absolute and indefeasible right made liable to be affected or prejudiced by any attempt to extend the access or use of light: *Tapling* v. *Jones* (4).

CHITTY, J.:—

The first question relates to light. The Plaintiffs' claim for their structure (to use a neutral term which I use on purpose at the commencement of this judgment) a right to have the light passing over the Defendant's property. The claim is not based on prescription at common law, nor upon any presumed lost grant, nor, indeed, could it be supported upon any claim of what has been termed in some of the cases implied covenant, which in a case like this must mean much the same thing as presumed lost grant. There is no presumption of a lost grant in this case,

(1) 2 C. P. D. 13.
(2) 11 C. B. (N.S.) 449.
(3) 2 J. & H. 555, 564.
(4) 11 H. L. C. 290.

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because both tenements, the alleged dominant and the alleged servient tenement, are held under the same landlord. The case of light is therefore confined, and indeed has been confined in the argument of the Plaintiffs, to sect. 3 of the *Prescription Act* (2 & 3 Will. 4, c. 71). On the construction of that section, seeing that the words are "any dwelling-house, workshop, or other building," it appears to me "any building" must mean a building analogous to those mentioned, otherwise it would be useless to mention workshop or dwelling-house particularly. It would have been enough to have said "any building." The section relates to the access and use of light to any buildings of a like nature with those which are described in the section itself. Now there is no definition in the Act of what is meant by "other building," and it is not for me to attempt to frame any definition. It appears to me that it would be an attempt to legislate. As I understand the matter it is the duty of the Court in each particular instance to come to a decision whether that which is called by the Plaintiffs a building is one within the meaning of the Act or not. Each case therefore must be decided, according to my view, upon its own merits. Now obviously a timber-yard is not a building, though the timber-yard may be used for the storing of timber, for the exhibition of timber for sale, and for the sale thereof. That I take to be quite clear. Such a yard as that, though used for this purpose, would not be a building within the Act. The structure of the Plaintiffs is something more than a mere timber-yard. It is a structure, but every structure obviously is not a building. It is necessary to consider, and I have considered, the nature of the construction, the design, and the use of this erection or structure. It has beyond question certain elements of permanence and stability. Its construction may be generally stated in this way; there are large upright baulks of timber, and there are cross-beams. There are besides, floors, above that, in some parts at any rate, there are coverings which serve as a roof, but not merely as a roof, but serve for the purpose of stacking timber on the top. These coverings have a double use, the protection of the timber which is below from the effect of the water and also the use for storing other and additional timber at the top. In this place the timber is stacked, is stored, is dried,

exhibited for sale and sold, and the Plaintiffs say that beyond all question light is a matter of importance to them. Those facts that I have stated are not decisive as to the character of the structure. It appears to me to be an important matter for consideration in this case that the structure is not enclosed. There is a back to it of timber or of planks. In no part is the structure affixed to any brick wall, but it rests on the upright baulks of timber that I have mentioned, which are tied together by cross timbers, and in some places have diagonal braces. Practically stated, without going through the details of every part, three sides are open. There are no windows in the common and ordinary acceptation of the term. There are apertures, being the spaces which are left between the uprights and the cross-beams. As far as design goes, the openings appear to have been left for the purpose, principally, of drying timber. They serve also, beyond all question, to admit the light. That is not in any way decisive, because if a man puts up three poles, two upright and one transverse, he can say that the light passes through the aperture that is left by the poles. There is no glass. That again is not decisive. The structure is not of stone, nor of brick. That again, to my mind, is not decisive, because I should, as at present advised, not hesitate to say that a structure of iron, wood, and glass completely enclosed, or for the great part enclosed, would be within the Act. An illustration was given during the argument for the Plaintiffs. A structure like the *Crystal Palace* would, I think, be a building within this Act. For the purpose of illustrating his argument Mr. *Ince* produced an imaginary model, not being an actual model of anything in existence on the Plaintiffs' property, but one which is now before me at this moment, and in that he has put glass, and then he asked the question: Suppose glass were there, would it not be a building? But it is impossible to argue a case of this kind on such an assumption as that, because obviously the slight differences on a matter of this kind make all the difference as to what is the character of the structure. Now if there had been glass it would have been enclosed, and also, if there had been glass there would have been an obvious design on the part of those who had erected and used the structure, to bring in light, and enjoy and

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use light in the ordinary and usual way for the purpose of the structure. In construing this section the Court should, to my mind, hold an even hand between the dominant and servient tenement, and should not, without saying it is a fair and proper case for doing it, restrict the ordinary right which a man has of building on his own land. It ought not to lean towards calling that which is a mere erection or construction, a building within this Act. A point, which is not decisive again, is one which I think worthy of mention. Would this structure be such as would put a reasonable man, without special knowledge of the law, on his guard against the acquisition of the easement of light, so that he might, thus being put on his guard, protect himself against the acquisition of the light? It appears to me that it would not.

There is another point that occurs, though I cannot on the present occasion give any precise decision on the matter, because it would not be right I should do so. It does not appear to me that this is a structure which the tenants, the Plaintiffs, intend to remove. That I cannot decide, as I say; nor do I make that point a principal element in my decision. But as far as I can see, it is an erection of that kind which could be removed by the tenant at the end of his tenancy. Now there is a considerable body of evidence. The experts have given their testimony on the matter, and it is not to be wondered at that there is a great conflict between them. On each side they appear to be equally confident that the view which they adopt is the right one. Little is gained by that. Again, reference has been made to the case of *Stevens* v. *Gourley* (1), on the *Metropolitan Building Act*. The observations of the Judges there are of use in pointing out what is a building and what is not, but the question that I have to decide really is a question of fact, and it is obvious that there may be a something which is a building for the purpose of the *Metropolitan Building Act* which is not a building for the purpose of the Act that I have to construe. The object of the *Metropolitan Building Act* is entirely distinct from the object of the Act now before me, and may be shortly stated to be for the sake of the convenience of the inhabitants of the metropolis, and to control struc-

(1) 7 C. B. (N.S.) 99.

tures and buildings accordingly. Now in a case of this kind it is necessary, and I have done so to some extent, to analyse all the particular parts of this structure, and I have considered it, as I was asked to do by the Plaintiffs, piece by piece; but though that is useful, it appears to me that the right way to decide a case of this kind is to take it as a whole, and to look at the thing in the model and in the photographs. The proposition I am about to put again is not a decisive one, but I will put it. Would an ordinary man, with a reasonable knowledge of the English language, passing this structure speak of it as a building? I agree that it is only putting it in a somewhat different form. The question in substance is one of fact, and viewing it as a whole, and having regard particularly to the model, and by no means disregarding the photographs which I have seen, I have come to the conclusion that this is a structure, but not a building within sect. 3 of the *Prescription Act.*

Now, the next point raised was with reference to air, and the Plaintiffs' claim here is not based on any prescription at common law, nor any supposed loss of grant. *Hall* v. *Lichfield Brewery Company* (1), before Mr. Justice *Fry*, was referred to, but obviously that case and his decision have no application to the present case. There could, as I have said, in such a case as this be no ground for presuming a grant, or, what in other words is the same, an implied covenant, because the land is here held under one common landlord; and, indeed, the argument of the Plaintiffs on this head of air was not put upon that foundation. The claim is not for the enjoyment of air upon the Plaintiffs' own property, but it is a claim for the passage or current of air over the Defendant's property. It is not a claim to prevent pollution of the air and interference with the enjoyment of the Plaintiffs' premises according to the ordinary proprietary right, but is a claim to a special easement by reason of the enjoyment of the twenty or forty years, and the claim was in this respect based upon sect. 2 of the Act. The claim is too vague and too indefinite. It is not to have the air passing through some definite channel (I speak with reference to the analogy of underground water, the analogy which has been referred to in cases of

(1) 43 L. T. (N.S.) 380.

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this kind), but it is to have the benefit of the current of air floating over the whole of the Defendant's property, over the yard, and over the rest of the property formerly occupied by buildings which have been taken down, the proposal of the Defendant being to erect higher buildings in lieu thereof. In my opinion this claim is too vague and too indefinite to fall within sect. 2 of the Act. I think it is entirely disposed of by a decision of the Court of Appeal in *Bryant* v. *Lefever* (1), where the question was with reference to the access of air to the chimneys of a building. Lord *Bramwell*, who gave the judgment of himself and Lord Justice *Brett*, states the principles very clearly, and Lord Justice *Cotton* deals with the question in the same way, and says (2): "The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air." That is his experience, and my experience accords with that, because in the *Lichfield Brewery Case* (3) no injunction was granted, but Mr. Justice *Fry*, having before him facts from which he considered he could imply a covenant, granted an order for damages. I should say it was the old practice, in all bills relating to the interference of light, to throw in air; but I believe that has been given up since Lord *Selborne* made the observations which fell from him in the *City of London Brewery Company* v. *Tennant* (4). Lord Justice *Cotton* then proceeds: "It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired." The proposition which he there enunciates, leaving it open for future decision, is clearly, from the rest of the judgment as well as from the passage I have read, not a proposition relating to a case of a claim of air over the whole of the servient tenement, but a claim where the air, the current of air, passes through a definite aperture or channel to and over a neighbour's property—where, as I understand it, there is some construction which can be seen to be for the purpose of bringing the air in a definite channel from the alleged servient to the dominant

(1) 4 C. P. D. 172.
(2) Ibid. 180.
(3) 43 L. T. (N.S.) 380.
(4) Law Rep. 9 Ch. 212.

tenement. In such a case as that it might be right to say that the section applied, and that it was shewn by the construction and the nature of the premises and the like that there was a particular easement intended to be created, and one that could be acquired under sect. 2. But the principle enunciated in *Bryant* v. *Lefever* (1) and again in *Webb* v. *Bird* (2) (a principle that was by no means embodied, as was partly suggested in argument, in the judgments or speeches in *Dalton* v. *Angus* (3)), is the proposition and is the principle on which I think this claim as to air ought to be decided. I decide that point, therefore, against the Plaintiffs also.

There are two subordinate points; the first of them relates to the traveller. The Plaintiffs have a tramway in the air, resting, as is shewn on the model, on two upright poles along which tramway the traveller passes, and the traveller, in its passage every time, gets a little over the boundary of the Plaintiffs' property. In respect of this an easement is claimed under sect. 2 of the Act. The easement is an easement analogous to the right of way, and therefore it is one which certainly could be within the section; about that I entertain no doubt. There is some evidence in the case of forty years' enjoyment. For the Defendant *Bright* v. *Walker* (4) was cited, but when that decision is looked at it will be seen that it is a decision on the earlier part of the section, viz., that which relates to the twenty years' enjoyment, but the Court proceeded on principle with reference to the whole of the section, and with reference also to sect. 8 of the Act, which relates to the reversion. It was decided in that case that where the easement had been enjoyed for twenty years, and the dominant and servient tenements were held under the same landlord, no easement was acquired; and the Court stated in so many terms that to acquire an easement under that part of the section the easement should be good as against the whole world. Of course, no such easement as was contended for could have been acquired at common law as against the common landlord of both parties, because the easement must be an easement in fee annexed to the seisin, annexed to the fee simple estate, a fee simple easement;

(1) 4 C. P. D. 172.
(2) 10 C. B. (N.S.) 268; 13 Ibid. 841.
(3) 6 App. Cas. 740.
(4) 1 C. M. & R. 211.

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and, certainly, the reasoning of the Court of Exchequer is that the statute had created a new kind of easement, or something which I called, for want of a better term, during the argument a base easement. The decision, however, is only a decision on the first part of the section, and the point as to the second part, that is, the forty years' enjoyment, has been before the Courts in *Ireland*, though it has been pointed out in those two decisions that *Bright* v. *Walker* (1) was, as I have stated, merely a decision on the twenty years' enjoyment.

Now, in *Beggan* v. *M'Donald* (2) the question was as to a right of way: whether it could be acquired as against a lessee for years by uninterrupted user of the right for a period of forty years, during the entire extent of which period the lease had been in existence, although the owner of the reversion had not acquiesced in the user, and the dominant and servient tenements were held under separate leases, the Irish Court of Appeal came to the conclusion that such a claim could be maintained. A similar point arose in *Fahey* v. *Dwyer* (3), where Mr. Justice *Lawson* and Mr. Justice *Harrison* held that a right of way could be acquired in respect of one tenement by user for forty years, against another held for a term of years under the same landlord. It will thus be seen that the Court in *Ireland*, having only the question of the forty years' portion of the section before them, took a view different from that which apparently the Court of Exchequer in *England* was prepared to adopt in *Bright* v. *Walker*, pointing out that the English Exchequer case was only on the twenty years, and the learned Judges in *Ireland* then proceeded to examine with care the provision of sect. 2 so far as it relates to the forty years, and also the other portions of the Act, including sect. 8. Now, one thing is quite clear in the construction of this Act of Parliament, that in sect. 3, which is a distinct enactment with regard to light, it is said in substance that the twenty years' enjoyment shall confer an absolutely indefeasible right. The same words are to be found in sect. 2 of the Act with regard to the forty years' period, but not with regard to the twenty years' period. The English Courts in regard to sect. 3—still bearing in mind

(1) 1 C. M. & R. 211. (2) 2 L. R. Ir. 560.
(3) 4 L. R. Ir. 271.

that that is a section which contains special and independent legislation as to light—have held in *Frewen* v. *Philipps* (1) that the fact that the two tenements are occupied under distinct leases both held under the same landlord is not material, and that the one tenant or lessee acquires, notwithstanding the unity of seisin, an easement as against the other. It appears to me that the Irish Courts are right in the conclusion that they have come to, because sect. 2, in regard to the forty years' enjoyment, enacts that the right is to be deemed absolutely indefeasible unless it should appear that the same was enjoyed by consent or agreement expressly given or made for the purpose by deed or writing, and then the difficulty which the English Court of Exchequer felt with reference to sect. 8, which gives the landlord, or the reversioner, the right to resist the claim within three years next after the end or sooner determination of the term, may, it appears to me, be easily reconciled with the other part of the enactment, namely, in this way:—the forty years' enjoyment gives an absolute right against all the world except the reversioner, and as to the reversioner, putting it shortly, he has three years after the determination of the lease in which he may, by this special enactment, resist the right which has been under the earlier part of the Act deemed and called absolute and indefeasible.

As far as this point is concerned, I think I ought to follow the judgment of the Court of Appeal in *Ireland*, but that does not dispose of this case. The properties, as I have stated, are all held under one common freeholder. Besides that, the Defendant holds a building agreement which applies to the entire area of the ground in his possession, that is to say, to the part which is not held under a lease and to the two parts also which are held under lease. Under this building agreement the Defendant is bound to pull down all the buildings on the land, and to erect new buildings of the character referred to in the agreement, and it is admitted that the performance of that covenant by him will render it necessary that he should erect a building which will interfere with this easement that I have been discussing. Now the Plaintiffs' case is, that they have a right as against the Defendant as lessee, and after what I have said I will take it that

(1) 11 C. B. (N.S.) 449.

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they have established that right. But they are asking for an injunction, and the Defendant is executing these works under the right of the landlord. He will get no new lease until he erects a building. If he erects a building then the existing lease will be surrendered, and I am not prepared to say, certainly not in the absence of the landlord, that the surrender of lease under this agreement made *bonâ fide*, and not for the purpose in any way of interfering with the Plaintiffs' right, is anything of which the Plaintiffs can complain, and I am not prepared to say in favour of the Plaintiffs that, within the language of sect. 8, the surrender of the lease would not be the sooner determination of the term. Now if the injunction is granted, the Defendant will never be in a position to ask the landlord to accept a surrender, he will never be able to go on with his building, and the landlord, who is not a party to this action, will lose that which he stipulated for, which is the benefit of having the whole plot of ground covered with better buildings, from which he will derive either a greater rent, or, by reason of his reversion, a greater benefit. If the lease had been put an end to, and if the sooner determination of the lease had now been reached, it appears to me that the landlord would be able to say, I am within sect. 8 and I can resist under sect. 8 the Plaintiffs' right. Now if I grant an injunction in the absence of the landlord, as I am asked to do, I shall be interfering with the right which it seems to me he has under sect. 8 of the Act, a right which has immediately come into operation. I cannot think it is just or convenient to grant an injunction in circumstances of this kind, even as against the Defendant, seeing that after all if the Plaintiffs are right they could in this respect recover damages against the Defendant. The effect of the injunction will be, as I say, certainly to prejudice the landlord very greatly, and it is not the course of the Court to grant an injunction which will have that effect as against an absent party. In the case of *Attorney-General* v. *Great Eastern Railway Company* (1) the agreement that was attacked, and against which an injunction was sought, was one in which the *Tilbury Railway* had an interest, and the late Master of the Rolls in declaring, as he did, that the act of the *Great Eastern Railway Company* was

(1) 11 Ch. D. 449; 5 App. Cas. 473.

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ultrà vires, refused to grant any injunction which would interfere with the operation of that agreement, because the *Tilbury Railway* were not parties. The result is that I think I ought not to grant any injunction in respect of this easement in the present state of the action.

Then there is another subordinate point about which there was a question for some time whether it was seriously put forward; however, it has been stated that the Plaintiffs do put it forward and maintain it. There is a small portion of this structure, about nine inches, which overhangs the Defendant's premises. Mr. *Jason Smith* says that the result of that is, that they have been in actual occupation of this as a corporeal hereditament within the meaning of the *Statute of Limitations* relating to land, and that they have thus acquired a title against the tenant. To pass over any other objection there may be, it is clear they got no title as against the landlord. Sect. 5 of the Act shews that. The proceeding is not a proceeding to recover land on either side, but it is a proceeding on the part of the Plaintiffs to protect their erection against a trespass on the part of the Defendant. I think again here it would not be right to grant an injunction, having regard to the rights which the landlord still has, and certainly not to grant an injunction unless the landlord is made a party. I therefore on this motion come to the conclusion that I ought not to grant any injunction. There will be no use in bringing the case again before me on the first two points—that is on the light case and the air case, nor do I think the Plaintiffs will be able to make anything of the other two. They may get some damages, but on that I say nothing. They may be able to make out some case, but in the present state of the record I decline to grant an injunction on this motion. I consider that my judgment on the first two points is final.

F. G. A. W.

C. A.

From this decision the Plaintiffs had appealed, and by consent further evidence was adduced, and the hearing of the appeal was treated as the trial of the action. The appeal came on for hearing on the 30th of March, 1886.

Ince, Q.C., and *Jason Smith*, for the Appellants (the Plaintiffs).

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Romer, Q.C., *MacSwinney*, and *Arthur Powell*, for the Defendant (the Respondent).

The arguments on the appeal being, in substance, the same as those addressed to Mr. Justice *Chitty*, are not repeated.

COTTON, L.J.:—

This case by agreement of both parties has been treated as the hearing of the action, subject only to a question which in the view we take will not arise. There were two questions really raised; and the first, and probably the most important, is that of the interference with the light which has been caused by the buildings of the Defendant; another interference with the right as regards air which is claimed by the Plaintiffs is the second in importance. I will not mention at present the other two questions.

As regards the right to light, it of course depends entirely on the statute, the words of which (sect. 3) are: "When the access and use of light to and for any dwelling-house, workshop, or other buildings shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible." Have the Plaintiffs made out that they bring themselves within that section? In my opinion they have not. I do not decide in this case, because I think it is not necessary to do so, whether constructions such as the erections on the Plaintiffs' property are buildings within the protection of that section. As I understand Mr. Justice *Chitty's* judgment, he thought they might more properly be considered as timber-stages than as buildings erected for the purpose of being used as warehouses or as sale-rooms—that they were simple stages of timber, and therefore did not come within the words of the section. But there is another point, the decision of which renders it unnecessary to decide that question, whether these timber-stages are buildings within the meaning of the Act, and I will not therefore give any opinion upon it. Assuming that they are buildings, have the Plaintiffs shewn that the access of light to and for those buildings has been actually enjoyed? Now it is undoubted that the purposes for which these structures have been used are—that timber of a certain class (not deals) has been stored there, and that

then from time to time customers have come, and certainly I think it must be considered that it is proved that in certain of these structures they have from time to time examined wood, and that they have used the light there for that purpose. But then we have the evidence, and I think it is what one would expect, that although from time to time, in some of these buildings, the wood may have been so arranged that the light has been used in the building for the purpose of determining whether the purchaser would take the wood—that he might see the character of it—as to hard wood, and as to fine wood—yet to my mind there is no evidence to shew that during the statutory period the light has been enjoyed as coming in through what are called the apertures left for air and for light, as it is said by the Plaintiffs, in these structures. They consist of floors and a roof supported by timber and cross timbers to keep the perpendicular timbers from bulging out, and to give strength to the building. In my opinion what is necessary to shew, under sect. 3 of the *Prescription Act*, as regards the building, is not only that the building has in some way or other always enjoyed light, but that it has done so by a definite access for the statutory period. All that you protect is the access of light through the windows which have been substantially in the place where they are at the time when the action is brought, for twenty years; and in my opinion it will not do in order to establish a right, to shew that though at some time light did not come in through a particular access, at other times it did, and that sometimes it came in through one and sometimes through another opening, which there was in the structure of the building, which would admit light. Here we have evidence that the timber was stored and placed in these structures in different ways from time to time. What is the consequence? It may be, and the evidence of the Plaintiffs has not negatived it, that at one time the timber would be so piled up that no light would come from the aperture which there might be at, say, the eastern end of the building, and that when the timber was piled differently it came in through the eastern, and could not come in through the western aperture. Very true, during all that time the erection or building may have enjoyed light, but it has not enjoyed, in my opinion, such access as will give a right to it to the occupier. In order to

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do that it must be shewn that there has been a definite access, I do not say through a window, but through some part of the building, and that there has been enjoyed in the building for the statutory period, the light which has come in through that definite mode or means of access. It is perfectly obvious that there is a vast distinction between this case and that of a window. A window is put obviously with the intention of letting light come through it, and where there is in the building a window not obstructed for the requisite number of years, it is considered that there has been an enjoyment by means of that window so unobstructed and uninterfered with for the required period, if the window and the house have existed for that period. But here, in my opinion, if the Plaintiffs could entitle themselves to any relief on the ground that this was a building within the meaning of the statute, they have not shewn that which, in my opinion, it was necessary for them to shew, not only that a particular building has for the twenty years been one in which light has been enjoyed, but that the light which has been enjoyed has come in during that period by a definite access—by the same access—in order to protect that access of light, and in order to prevent anyone from putting up a building which would prevent light coming through that definite access through which light has been so long enjoyed.

Then, coming to what is said also to be a very important matter—air—have the Plaintiffs made out any right in respect of air? It must be claimed either under the common law, or by a presumed grant, or under the statute. Now the circumstances here are not such as will justify us in holding that there was any covenant by the owner of the alleged servient tenement not to interfere in any way with the access of air to the Plaintiffs' premises. There was a common landlord, and that of itself would be very strong against any claim of this kind unless it was brought under the statute, and there are no circumstances which, in my opinion, would justify me in coming to the conclusion that there is any such covenant as is alleged. That will appear more strongly when one comes to consider what the claim is. The claim, as I understand it, is a claim to prevent the Defendant from depriving the Plaintiffs of that which they say they have hitherto enjoyed, and of which they certainly have had the benefit—the current

of air uninterruptedly over the whole of the space which, until the new buildings were put up, was occupied by the yard at the back of the Defendant's premises. That is the nature of their claim, and in my opinion we are bound by the decision in *Webb* v. *Bird* (1) that such a claim as that is one for the purpose of asserting which a plaintiff cannot rely on the statute. What was said in the Exchequer Chamber by Mr. Justice *Wightman* in delivering the judgment of the Court (2) was this: "We agree with the opinion of the Court of Common Pleas, that the right to the passage of air is not a right to an easement within the meaning of 2 & 3 Will. 4, c. 71, s. 2." And this was also said by Lord *Blackburn* in *Dalton* v. *Angus* (3): "I think this decision, that a right of prospect is not acquired by prescription, shews that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird* and *Chasemore* v. *Richards* (4) are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive." And to my mind, although it is quite enough to say in this Court that we are bound by the decision of *Webb* v. *Bird* in the Exchequer Chamber, yet in our opinion the right claimed here is in no way like any such easement as is in terms mentioned or as is obviously intended to be protected by the *Prescription Act*. As regards light that is an entirely different matter from air. Light, the principal light which we enjoy, comes to us in a direct line, in direct pencils, and the light which is thrown over a neighbour's land goes over a very short space indeed. But here it is not a claim to air as coming in a defined channel over a neighbour's land, but it is a claim which is made in respect of a building not in any way closed up but made with openings,—merely a skeleton of a

(1) 10 C. B. (N.S.) 268; 13 Ibid. 841.
(2) 13 C. B. (N.S.) 843.
(3) 6 App. Cas. 824.
(4) 7 H. L. C. 349.

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building if I may say so—with timbers supporting the floor and roof, and cross-beams to keep them in their position and make them steady; to prevent the Plaintiffs' neighbour from doing anything which will prevent the current of air over his open yard from coming to the whole face of the Plaintiffs' buildings as freely as it originally came when he did not choose, and it was not necessary for him, to apply the land for the purpose for which he is now intending to apply it. That, in my opinion, would be a most serious interference with the right which every one has to use his property, so long as he does not interfere with those rights of his neighbour in respect of which the law gives such neighbour a right of complaint if they should be interfered with. In my opinion, therefore, there is no case made out here for holding that the Plaintiffs are entitled to that right of air which they claim as against the Defendant.

Then the only other points are two. It is said that one of these structures projected on its upper storey nine inches beyond the boundary of the Defendant, and it was put as high as this—that by that means the Plaintiffs got by twelve years' occupation a right as of a sort of freehold in the air, and that they could not be ejected from that. Now, in my opinion, if there was evidence that that state of things existed, it would be a claim to an easement over the Defendant's lands. But really there is no evidence, when we come to consider it, that there was anything of the kind. It was said that the model shewed that it must have been so, but as the parties chose to come here as at the trial of the action, we ought not, in my opinion, to be called upon to interfere with the undoubted rights of the Defendant unless there is something which the Plaintiffs have acquired which interferes with the use of those rights by preventing his putting up this building simply on the suggestion that there has been this projection for a period of twelve years. It is not suggested, I understand, that that has been for thirty or forty years, but reliance was placed on the fact as giving him a right to this freehold in the air by the occupation of twelve years. As I say, there is no evidence to support that claim. Then as to the other claim. There is a "traveller" supported by beams in the air, which no doubt was very useful for the purposes of the Plaintiffs' business.

It carries the large masses of timber from one end of the yard to the other, and we were asked to grant an injunction to restrain any interference with that, or if not, to grant damages. As regards an injunction we did not call on Mr. *Romer*. In my opinion it would be wrong, even if any right was established in respect of that "traveller" by way of easement, on that ground to restrain the Defendant from using his property as he now considers it desirable to do. The only question would be whether there was a case for damages. Assuming that there is some interference with the use of the "traveller" as it has been constructed and used for the last twenty years, there might be a case for damages though not for an injunction. But there is no real evidence tending to shew that there is any damage, and looking at it as a matter of substance, I think that there is not such a case of probability of any substantial injury to the Plaintiffs in respect of that—the only suggestion being that as the machinery was now constructed they could not carry the timber quite to the extremity of their land. I think there is no such evidence before us as would justify us in thinking there is any material injury, and if so I think we ought not to protract this litigation by directing an inquiry to see whether they have sustained any and, if any, what damage by the interference with their right. In my opinion, therefore, the action must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. One cannot help feeling a sort of sympathy for the Plaintiffs, but we cannot alter the law, which must be decided according to the materials before us. First, as to the right to light which a person acquires under the *Prescription Act*, sect. 3. It is a right to the access and use of light which for twenty years has been enjoyed to and for a building. Putting aside the difficulty about that word "building," and assuming for the purposes of the case that this is a building, still the access of light to which alone you acquire a right must be the same access as that which you have enjoyed: that is to say, you cannot claim a window in one place because you have been accustomed to enjoy a window in another place which has been receiving cones of light of a different character, and passing in a

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different direction. And our difficulty here has been that really we have to decide a question of right about each of these frame-works, which I will call for the purposes of argument apertures—to consider with regard to each of them whether it is one in respect of which a right to access and use of light has been acquired. I quite agree that it does not follow that because you have not for some one moment or another in each year happened to enjoy the full flood of light which would pass through an uninterrupted window, that still there may not have been a continuing enjoyment which would satisfy the statute. Otherwise a man could not pull down his blinds without fear of losing his right to light. One must look at the whole case and see whether there has been a continuous enjoyment for twenty years. But the difficulty is, that in applying our minds to each window it is impossible for us to say that we are satisfied that as to any one of the apertures or frames there has been a continuous enjoyment of any definite amount of light which has been interfered with. All these windows have been rolled together, so to speak, in the affidavits, and we are met with general affidavits that the access and use of light has been interfered with. We cannot consider a case in that vague way; we must give our minds to each question, each issue, of the access of light. The Plaintiffs therefore fail to make out their case as to light. It is a failure of evidence.

Then we come to the air. It seems to me that the only claim for air which could be supported here is a claim to the passage of undefined air over the premises of the Defendant till it reaches the Plaintiffs' property. It would be just like amenity of prospect, a subject-matter which is incapable of definition. So the passage of undefined air gives rise to no rights and can give rise to no rights for the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt. It is not necessary to go into it further. *Webb* v. *Bird* (1) in the Exchequer Chamber decides that the passage of undefined air is not capable of being claimed under the *Prescription Act*, nor can it be in this case claimed under common law any more; and it seems to me, therefore, that after the decision in *Webb* v. *Bird* the claim to air fails.

(1) 13 C. B. (N.S.) 841.

With regard to the "traveller" and the alleged trespass I have nothing to add to what the Lord Justice has said.

FRY, L.J.:—

I am of the same opinion. I cannot help to some extent regretting that the Plaintiffs have thought fit to have the case tried in the manner in which it has been tried before us here. It seems to me conceivable that if the case had been tried in a different manner the result might have been in some particulars different. But we have to consider whether the Plaintiffs in this case have satisfied us affirmatively of the access to and use of light in the structures, which they call buildings, for the twenty years required. Now the evidence is of a most general and, I think, most unsatisfactory description. It goes to shew that the several blocks of buildings have been for this period of years used "to store, shew, and season the stock." I am reading from the affidavit of one of the principal witnesses, Mr. *Davis*. Which particular building has been used for show, which has been used for seasoning stock, for what period of time the seasoning of timber may have obstructed all access of light to a particular building, during what period light may have been used in another part—all this has been left vague and uncertain before us, and therefore I entirely agree with what has been said, that whilst the burden of proving that access to and user of light to and for the building rests upon the Plaintiffs, the Plaintiffs have not discharged that burden. I say that, whether the structure in question be or be not a building: a point on which I do not desire to express any opinion, as in my judgment it becomes unnecessary. Then with regard to the case as to air, I think this question is really determined for us by the decision in *Webb* v. *Bird* (1). The Plaintiffs, if they claim the right of air, must do so either at common law or under the statute. With regard to the claim at common law, which according to my notion would be a claim to a covenant not to interfere with the access of air to the Plaintiffs' premises, it appears to me that the circumstances are not such as for a moment to justify us in raising a presumption of the existence of such a contract. The case is not one in which air passes through defined

(1) 10 C. B. (N.S.) 268; 13 Ibid. 841.

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apertures from the Defendant's to the Plaintiffs' tenement, but it is one in which the air passes over the whole site of a long yard or yards. I think, therefore, that at common law the Plaintiffs' claim cannot be substantiated, and I entirely agree with what has been said by Mr. Justice *Willes* in *Webb* v. *Bird* (1): "In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense." According to the view which I take that principle lies at the foundation of the cases of *Chasemore* v. *Richards* (2), *Webb* v. *Bird*, and *Sturges* v. *Bridgman* (3). Now with regard to the question whether the Plaintiffs can succeed under sect. 2 of the statute, that is to my judgment determined for us in the case of *Webb* v. *Bird*. That proposition was affirmed not merely in the Court of Common Pleas but in the Exchequer Chamber, a Court of co-ordinate jurisdiction with ours. Therefore I think on all these grounds the Plaintiffs fail.

With regard to the "traveller" and the nine inches of overhanging warehouse, or whatever it may be called, I do not desire to add anything.

Solicitors: *Roscoe, Hincks, & Sheppard; A. H. Crowther.*

(1) 10 C. B. (N.S.) 285. (2) 7 H. L. C. 349.
(3) 11 Ch. D. 852.

F. G. A. W.

C. A.
1886
April 10, 12.

In re ROBERTS.
KIFF *v.* ROBERTS.

[1885 R. 1138.]

Pauper—Appeal in formâ pauperis—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 22, 23, 24.

Where a party who has not sued or defended as a pauper in the Court below applies for leave to appeal *in formâ pauperis*, the Court will follow by analogy Order XVI., rr. 22, 23, and 24, and not the old practice as to such appeals.

A married woman suing without a next friend, her husband not being a party, applied for leave to appeal *in formâ pauperis*:—

Held, that her husband as well as herself must make the affidavit required by rule 22.

THIS action commenced by originating summons taken out by *Lavinia Kiff*, one of the next of kin of *John Roberts*, to obtain a declaration that the will of *Roberts*, dated the 30th of December, 1883, passed only real and leasehold property, and that the testator died intestate as to the rest of his personal estate. The Plaintiff was a married woman, married before the *Married Women's Property Act*, 1882, and took out the summons without a next friend and without making her husband party to the proceedings. She did not sue *in formâ pauperis*. Mr. Justice *Pearson* decided that the will passed all the testator's property. The Plaintiff now applied to the Court of Appeal for leave to appeal *in formâ pauperis*.

April 10. *Dunham*, for the application, referred to the form of order in *Seton* on Decrees (1), and *Drennan* v. *Andrew* (2), and submitted to the Court whether the old practice as to leave to appeal *in formâ pauperis* was to be followed, or whether the Court would follow by analogy rules 22, 23, and 24 of Order XVI., which relate to suing and defending *in formâ pauperis* and do not mention appeals.

April 12. THE COURT (*Cotton*, *Bowen*, and *Fry*, L.JJ.) held that the analogy of Order XVI., rules 22, 23, and 24, was to be

(1) 4th Ed. p. 1646. (2) Law Rep. 1 Ch. 300.

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followed instead of the old practice. Their Lordships also held that the husband of the Appellant, as well as the Appellant herself, must make the affidavit of poverty required by rule 22.

MINUTES OF ORDER:—Upon motion this day made, &c., who alleged that by the order, &c., that the Plaintiff is desirous of appealing from the said order, but by reason of her poverty she is unable to present or prosecute her said appeal unless she shall be permitted to do so *in formâ pauperis*, and upon reading three several affidavits of *Richard Kiff*, of the Plaintiff as to her poverty, and of *George Reader*, all filed the 12th of April, 1886, and the exhibit A in the last-mentioned affidavit referred to, being a case for the opinion of counsel with the opinion of Mr. *A. Dunham* of counsel thereon, the proposed notice of the said appeal, and the certificate of counsel subscribed at the foot of the said notice that the said appeal is proper to be heard, Order that the said appeal be set down for hearing, and that the Plaintiff be at liberty to prosecute the same *in formâ pauperis*, and that Mr. *A. Dunham* be assigned counsel and Messrs. *Reader & Hicks* solicitors for the said Plaintiff in the said appeal.

Solicitors: *Reader & Hicks.*

H. C. J.

C. A. 1886 KAY, J. *March* 13, 25. C. A. *April* 21.

In re HILL, A SOLICITOR.

[1884 H. 4906.]

Costs—Taxation—Objections, Notice of Consideration of, by Taxing Master—Charge on Fund recovered by Solicitor—Costs of Proceedings to dispute Retainer—Costs of Appeal subsequent to Charging Order—23 & 24 Vict. c. 127, s. 28 [Revised Ed. Statutes, vol. xiii., p. 881].

Objections carried in to the taxation of costs should shew the ground on which the items questioned are objected to.

Objections to the taxation of a bill of costs were lodged, and a warrant to consider them was issued on the 4th of December. On the same day the solicitor who lodged the objections received from the Taxing Master at 4.30 P.M. a notice that he had appointed 1 o'clock on the following day to consider them:—

Held, that the notice was, under the circumstances, sufficient.

By an order of the Court the costs "properly incurred" by the Plaintiff's solicitor "in recovering" a fund were directed to be taxed:—

Held, that the costs incurred by the solicitor in establishing against the Plaintiff his retainer as solicitor in the matter were rightly included in the taxation.

After the date of the order directing the taxation, an appeal by the Defendant against the order by which the retainer of the Plaintiff's solicitor

was established came on for hearing, and was dismissed, and the Taxing Master included in the taxation already directed the costs of the Plaintiff's solicitor of this appeal:—

Held, that such costs, although incurred subsequently to the date of the direction for taxation, being costs incurred in resisting the continuation of the attempt to destroy the proceedings by which the fund had been recovered were properly included in the taxation.

Decision of *Kay*, J., affirmed.

MESSRS. *HEAD & HILL*, a firm of solicitors, acted for one *Robert Tharle*, the administrator and one of the next of kin of *Elizabeth Robey*, a person of unsound mind, who had died intestate, in the administration of her personal estate, and with the permission of *Tharle* they retained their costs out of moneys in their hands representing part of such estate.

Jane Blow, who was entitled to an interest in the estate as one of the other next of kin, obtained on the 22nd of December, 1884, through Mr. *Richard Hooper*, a solicitor who acted on her behalf in the matter, an order for the taxation of Messrs. *Head & Hill's* costs, and Mr. *Hooper*, in course of the taxation, succeeded in getting the sum of £354 13*s.* 6*d.* taxed off such costs, which sum Messrs. *Head & Hill* were by an order directed to repay to *Tharle*.

On the 3rd of June, 1885, *Jane Blow*, through Mr. *Hill*, a partner in *Head & Hill*, as her solicitor, made application by summons to Mr. Justice *Kay* that the order of the 22nd of December, 1884, and all proceedings thereunder might be annulled and set aside on the ground that *Jane Blow* (who was an illiterate person) had never given Mr. *Hooper* any proper and sufficient retainer, and that in fact the proceedings under which the order of the 22nd of December, 1884, was obtained had been taken without her authority or knowledge. This application was refused with costs by Mr. Justice *Kay*; *Jane Blow* appealed from this refusal; and on the 31st of July, 1885, her appeal was dismissed, and the order of Mr. Justice *Kay* was affirmed by the Court of Appeal.

Meanwhile Mr. *Hooper* had applied by summons for a charging order upon the £354 13*s.* 6*d.*, and the Court, on the 23rd of June, 1885, "being of opinion that the said *R. J. Hooper*, as the solicitor employed by the said *Jane Blow* in the prosecution of this matter

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is entitled to a charge upon the sum of £354 13*s.* 6*d.* (which by the Taxing Master's certificate, dated the 30th of March, 1885, is certified to have been overpaid to Messrs. *Head & Hill*) for the costs of the said *H. R. Hooper* as between solicitor and client properly incurred in the recovery of the trust fund by means of this matter," referred it to the Taxing Master to tax such costs as between solicitor and client, including in the taxation the applicant's costs of the summons, and directed Mr. *Hill* to pay such costs when taxed out of the balance due from him, and to pay the residue of such balance to *Tharle* as the administrator of *Elizabeth Robey*.

Under this order Mr. *Hooper* carried in his bill of costs and included therein the costs of the order of the 3rd of June, 1885, made upon the summons raising the contest between *Jane Blow* and himself as to whether he had been properly retained by her; and also included certain items subsequent in date to the charging order of the 23rd of June, 1885, which items were in respect of the costs of the appeal from the order of the 3rd of June, 1885, which was dismissed on the 31st of July, 1885, and comprised items such as "Drawing brief on appeal," "Fee to counsel," and so forth, down to and including the 18th of August, 1885.

The Taxing Master allowed Mr. *Hooper* his costs of and incidental to the order of the 3rd of June and also of the appeal therefrom; and *Tharle*, as the administrator of the estate entitled to the £354 13*s.* 6*d.* on which these costs were to be charged, carried in objections to the taxation, "because these items should not be allowed under the order of the 23rd of June, 1885, and are not taxable or payable out of the estate of the said *Elizabeth Robey*."

The Taxing Master disallowed these objections, and Mr. *Hill*, *Tharle's* solicitor, made the following affidavit as to the circumstances attending such disallowance:

"I, on behalf of my firm, prepared, and on the morning of the 4th of December, 1885, personally lodged objections to the taxation at the chambers of the Taxing Master, and issued the warrant to consider the same; but I was informed by the officials that I could not then have an appointment to proceed upon the same; and that the Taxing Master would peruse the objections, and send

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my firm a notice of an appointment to proceed thereon in due course. At 4.30 P.M. on the said 4th of December a notice was received by my firm from the chambers of the Taxing Master, stating that the Master had appointed 1 o'clock on the following day, the 5th of December, to proceed thereon, which appointment I was unable to attend, owing to the insufficiency of the length of the notice thereof, and to an important engagement which I had, prior to the receipt thereof, arranged personally to attend on the 5th of December, and I accordingly gave directions for a clerk to attend upon the Taxing Master on the morning of, and again at 1 o'clock on, the said 5th of December, informing him thereof, and requesting him to adjourn the same, to enable me, as I personally attended to the matter, to attend; but he on each occasion declined to do so, and stated that he had disallowed the objections, owing to which my firm have not had an opportunity of being heard by the Master on the objections."

The application came on for hearing before Mr. Justice *Kay* on the 25th of March, 1886.

Oswald, for the Applicant.

Chadwyck Healey, for Mr. *Hooper*.

Pochin, for *Jane Blow*.

KAY, J. (after stating the facts of the case, first dealt with the objection that Mr. *Hill* had not had a proper opportunity of stating his objections to the Taxing Master, and said, that, although it was a little hard upon Mr. *Hill*, and he ought to have had given to him a little more opportunity of attending the Taxing Master, the objections being now before the Court upon an application to consider them, His Lordship saw no reason for sending the matter back to the Taxing Master. His Lordship then, after remarking that the charging order had been made upon the footing that by the proceedings conducted by Mr. *Hooper* for the taxation of Messrs. *Head & Hill's* costs, £354 13*s.* 6*d.* had been in fact recovered to the estate of *Elizabeth Robey*; and that, if the attempt made by *Jane Blow*, through Mr. *Hill*, as her solicitor, to dispute the retainer on which Mr. *Hooper* had obtained the

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taxation had succeeded, the taxation proceedings would have altogether failed, continued):—

A decision was given against that attempt, which was taken to the Court of Appeal, who affirmed it. Now the question is whether the costs of that attempt to destroy the whole taxation, the success of which would have left the sum of £354 13*s.* 6*d.* in the hands of Mr. *Hill*, are or not properly costs of recovering or preserving this fund. They are in my opinion both, and they are clearly costs within the jurisdiction of taxation under the reference to the Taxing Master, directed by the charging order of the 23rd of June, 1885.

But there is this further point—some part of these costs, that is to say, the costs of the appeal, were actually incurred after the date of that charging order. That is the only point which seems to me to have any substance in it at all. Now in point of fact that appeal was a continuation of the proceedings which had been going on in the Court below for the purpose of endeavouring to destroy the fund which had been so recovered, and a continuation of the proceedings to preserve the fund, the preservation of which was the object of their original institution. Therefore the Taxing Master is right in including those costs in the taxation, although they were actually incurred after the date of the charging order. The application accordingly fails, and I refuse it with costs.

From this decision *Tharle*, the administrator, now appealed. The appeal was heard on the 21st of April, 1886.

Oswald, for the Appellant:—

1. No proper notice was given to the Appellant of the appointment to consider the objections to the taxation. By analogy to Order LXV., rule 16, at least one clear day's notice ought to have been given; and even if that Order does not apply the notice must be a reasonable notice, whereas the notice actually given was so short that the party objecting did not have a proper opportunity of being heard.

[FRY, L.J.:—It was simply a case of the Court directing a hearing of objections; it was not a notice of taxing costs between the parties.]

2. The costs of the application of the 3rd of June, 1885, ought not to have been allowed by the Taxing Master, for they were the costs of a personal dispute between *Jane Blow* and Mr. *Hooper* as to his retainer by her, and were in no sense costs incurred by him in the recovery or preservation of the £354 13*s.* 6*d.*

3. At any rate the costs of the appeal from the order of the 3rd of June, 1885, which were incurred after the date of the charging order of the 23rd of June, 1885, cannot be included in the taxation directed by that order.

[He referred to *Mildmay* v. *Quicke* (1).]

Pochin, for *Jane Blow*.

Chadwyck Healey, for Mr. *Hooper*, was not called upon.

COTTON, L.J. :—

This is an appeal from an order of Mr. Justice *Kay*, refusing with costs an application by the administrator and one of the next of kin of *Elizabeth Robey* that the objections taken in by the Appellant to the taxation of costs in this matter might be allowed. Before I deal with the case, I must say that the objections taken in were very unsatisfactory, for they in no way pointed out the ground upon which it was contended that the items objected to ought not to be allowed. In cases of this kind the objections should shew upon what ground the items in question are objected to, and I have thought it right to mention this, so that it may not be supposed that we approve of the form in which the objections have been framed.

It is said that the Taxing Master has not given the party objecting an opportunity of urging before him the objections that he took. In my opinion there was an opportunity given. The objections are taken in on the 4th of December, 1885, and on that very day the Taxing Master gave notice to the solicitor acting for the Appellant that the objections would be considered the next day. The solicitor was so busy that he could not personally attend, and he sent a clerk; but, in my opinion, this is not a sufficient reason to justify us in sending the matter back

(1) 6 Ch. D. 553.

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to the Taxing Master. We have the objections before us and the answers given by the Taxing Master—it is true without having heard the argument of the solicitor who appears for the Appellant—but we have his reasons, and now we know what can be said in argument in favour of the objections and in answer to the view of the Master.

Now the facts are these: The taxation of Messrs. *Head & Hill's* bill of costs was directed to be made by an order dated the 22nd of December, 1884, which was obtained by *Jane Blow*, one of the parties beneficially interested in the estate, through Mr. *Hooper*, as her solicitor. Under that order Mr. *Hooper* obtained a sum of £354 13*s.* 6*d.* for the estate of *Elizabeth Robey* by having the bill of Mr. *Hill* taxed and reduced by that amount. He then, on the 23rd of June, 1885, obtained a charging order upon that sum, and this order directed a reference to the Taxing Master to tax the costs "properly incurred" in the proceedings to recover that sum. On the 3rd of June, 1885, *Jane Blow*, by Mr. *Hill* as her solicitor—the solicitor whose bill was being taxed—made an application that the summons of December, 1884, might be taken off the file or dismissed with costs, and that the taxing order of the 22nd of December made thereon might be annulled and set aside, upon the ground that the summons had been taken out and the order obtained without the authority or knowledge of the Appellant, *Jane Blow*. That was a step on her part to destroy the retainer of Mr. *Hooper* and to put an end to the taxation and the proceedings by which Mr. *Hooper* eventually recovered £354 13*s.* 6*d.* for the estate which the Appellant represents; and, in my opinion, all costs properly incurred connected with the order for taxation were costs properly incurred in recovering the sum of £354 13*s.* 6*d.* The Court of Appeal thought that those proceedings by *Jane Blow* or her solicitor were proceedings taken, not in order to represent to the Court what she had authorized and what she desired to do in December, but in order to prevent the solicitor's bill being effectually taxed; and all costs in resisting that application and in preventing the proceedings being put an end to were, in my opinion, costs incurred in the recovery of this sum of £354 13*s.* 6*d.*

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The doubtful point is as to the costs of the appeal. The costs of the application undoubtedly were costs incurred subsequently to the order of the 23rd of June, 1885, giving a lien and directing taxation. We have that order before us. [His Lordship then read the order.] Now it has been urged that the costs of the appeal were of a date subsequent to that order, and that those costs certainly could not have been included in that order, which only extended to costs already incurred. But in the order the costs are not limited to "costs already properly incurred;" the expression is "costs properly incurred;" and, in my opinion, that may properly include the costs of the appeal, which were really costs incurred in the continuation by Mr. *Hill*, through *Jane Blow*, of the proceedings which she had commenced by an application before the order was obtained.

Therefore, in my opinion, the judgment of Mr. Justice *Kay* was right, not only in saying that the costs incurred previously to this order in recovering this fund and in preventing the taxation being defeated were included in this order, and ought to be allowed, but he was also right in saying that the costs of the appeal, which were costs incurred in the continuation of the proceedings already begun in the name of *Jane Blow*, were proper to be allowed by the Taxing Master. In my opinion, therefore, this appeal must fail, and the usual result must follow—that is, that the appeal must be dismissed with costs.

BOWEN, L.J.:—

I agree.

FRY, L.J.:—

I also agree.

COTTON, L.J.:—

The proper order will be: Appeal dismissed with costs, and the costs not paid by the Appellant must be paid out of the sum of £354 13*s.* 6*d.* as part of the estate which the Appellant represents.

Solicitors: *Head & Hill; Rice & Burnett; Sole, Turner, & Knight.*

W. W. K.

C. A.
1886
May, 17, 18.

In re PARROTT.
WALTER *v.* PARROTT.

[1885 P. 2632.]

Will—Direction to settle Legacy—Form of Settlement.

A testator bequeathed as follows: "To my daughter *A.*, wife of *M. W.*, I bequeath £10,000. This amount to be settled upon her for her life and to be invested for her in good securities in the names of two or more trustees. At her death £8000 of the above sum to be divided equally amongst her children, and the remaining £2000 to be given to her husband if living; if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the Court to a settlement of the legacy. *Bacon*, V.C., held a settlement unnecessary, and ordered that the fund should be paid into Court and the income paid to the daughter for life, with liberty to apply on her death; and he ordered the executrix to pay the costs out of the residue:—

Held, on appeal, that a settlement ought to be directed, treating the directions in the will as instructions for a settlement:

Held, on the construction of the will, that the settlement must be so framed as to make the contingent gift of £2000 to "her husband if living" apply only to *M. W.* and not to any future husband, and so as to confine the trusts in favour of the daughter's children to her children by him:

Held, further, that the settlement ought to be framed so as to restrain the daughter from anticipating the income, and so as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry, and that it ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or her next of kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the direction for equal division.

Oliver v. *Oliver* (1) distinguished.

Held, that the costs ought to be paid out of the legacy and not out of the residuary estate.

J. C. PARROTT, by will dated the 3rd of May, 1884, gave various legacies, among which was the following:—

"To my daughter *Annie*, wife of Major *Walter*, I give, devise, and bequeath the sum of £10,000. This amount to be settled upon her for her life, and to be invested for her in good securities

(1) 10 Ch. D. 765.

in the names of two or more trustees. At her death £8000 of the above sum to be divided equally amongst her children, and the remaining £2000 to be given to her husband if living, if deceased, then the whole amount is to be divided equally amongst her children." He appointed his widow, *Maria Parrott*, his sole executrix.

After the death of the testator a settlement of the £10,000 was prepared, and Major and Mrs. *Walter* and their infant child took out an originating summons against Mrs. *Parrott* as Defendant, to obtain the sanction of the Court to its execution.

Vice-Chancellor *Bacon* held that a settlement was unnecessary, and ordered the executrix to pay the £10,000 into Court, and directed it to be invested and the income paid to Mrs. *Walter* for her life, with liberty to any parties interested to apply on her decease. The costs were ordered to be paid out of the general estate of the testator.

The Plaintiffs appealed.

Howard, for the Appellants:—

I submit that the testator clearly intended that a settlement should be made of this fund, and that he has not "been his own conveyancer," but only given instructions for a settlement. Such a settlement cannot be made without the decision of the Court as to what provisions it ought to contain. I do not contend that the husband should have a life interest—the terms of the will appear to exclude that, but I submit that a power of appointment among the children should be inserted, as that is a usual and proper power and beneficial to the family: *In re Gowan* (1). Notwithstanding the words importing equality of division such a power may be given: *Oliver* v. *Oliver* (2). There should be the usual provision making the shares vest only in sons who attain twenty-one and daughters who attain twenty-one or marry. Such powers ought to be inserted as are usual in the settlement of the fortune of a ward of Court. The settlement ought to be confined to children by Mrs. *Walter's* present marriage, the reference to the husband at the close of the disposition shewing that only her existing marriage was in the testator's contemplation.

(1) 17 Ch. D. 778. (2) 10 Ch. D. 765.

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1886
In re PARROTT. WALTER *v.* PARROTT.

Leeke, contrà :—

The reference to the husband in the first place is merely a part of the usual description of a married woman, and there is nothing to restrict "her children" to her children by him. Those words ought to be taken in their plain ordinary sense. The words "her husband" *primâ facie* apply to any husband, and ought not to be confined to the existing husband. If the Court does not adopt this view the question ought to be left open that if Mrs. *Walter* should die leaving a second husband surviving her he may bring forward his claim.

Howard, in reply :—

It is an unnatural construction to make the provision as to the £2000 apply to a future husband. "Her husband" is most naturally read as meaning "her said husband," for nobody would refer to a future husband who survived her as "her husband if living." It is highly improbable that the testator should intend to give a fifth of the capital to a future husband.

COTTON, L.J. :—

The Vice-Chancellor in this case ordered the £10,000 to be retained in Court, and if the case had been one depending on judicial discretion I should not have been disposed to interfere, but it appears to me that he did not construe the will rightly, for the testator in my opinion has clearly shewn his intention that a settlement shall be made, inasmuch as he has directed that the fund shall be invested in the names of two or more trustees. I think, therefore, that the fund ought not to be retained in Court, but that a proper settlement of it should be made. The course which the Vice-Chancellor has taken leaves several questions open which, in my opinion, ought to be settled at once.

There must be two or more trustees in whom the fund is to be vested. What, then, is to be the nature of the wife's life interest? I think that it ought to be for her separate use with a restraint on anticipation. The will says nothing about this. The law would now give it to the wife's separate use, but I think that we ought to supplement this by introducing the restraint on dealing with it which is usual in settlements.

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Then how are the children to take? Ought there to be a power of appointment among them? I think that there ought not, for the will contains an express direction that the fund shall be divided equally among them—and the object of a power of appointment is to enable the donee of the power to make the division unequal. Such a power is, as a general rule, useful and desirable, but to insert it here would go against the testator's express intention. *Oliver* v. *Oliver* (1) was a different case. There the husband had contracted to give effect to the wife's equity to a settlement, and the Court thought that she ought to have such a power of appointment as would have been given her if the Court had been enforcing the equity against the husband. That case, therefore, does not apply to the present. I am of opinion, however, that, as usual, the fund should vest only in those children who being sons attain twenty-one, or being daughters attain that age or marry, and that the usual powers of maintenance and advancement ought to be inserted.

We then come to the question whether the contingent gift to the husband applies to the present husband only or to any husband of the tenant for life who may survive her. It was pressed upon us that we ought to give the words of a will their ordinary meaning; but we must look at the whole of the will to see what was in the testator's mind. Testators do not usually contemplate the second marriage of a lady who is married when the will is made. We find in the gift of the £10,000 a reference to an existing husband, and I think that the scheme of the settlement directed by the testator is to exclude him from everything except a contingent interest in £2000, and that he is the person referred to afterwards as "her husband." The words "her husband if living" are more naturally construed as meaning "her above-named husband if living," than as equivalent to "any husband of her's who may be then living."

The remaining question is, what children are to take—children of the existing marriage, or children of Mrs. *Walter* by any husband. In my opinion the testator was referring only to issue of the existing marriage. The trusts subsequent to the life estate will be, as to one fifth of the fund for Major *Walter* absolutely if

(1) 10 Ch. D. 765.

C. A. 1886 *In re* PARROTT. WALTER *v.* PARROTT. Cotton, L.J.

he survives his wife, and as to the remaining four fifths, and if he dies in her lifetime, then as to the whole in trust for all the children of Mrs. *Walter* by her present husband in equal shares, to vest as to sons on attaining twenty-one, and as to daughters on attaining that age or marrying, with the usual powers of maintenance and advancement. If no child attains a vested interest, the entirety of the fund, or if Mrs. *Walter* dies in her husband's lifetime then four fifths thereof, to be held in trust for such person or persons as she shall by deed or will appoint, and in default of such appointment, if she survives Major *Walter*, then as to the whole fund in trust for her absolutely, but if she dies in his lifetime then as to four fifths of the fund in trust for the persons who would have been entitled under the *Statutes of Distribution* if she had died possessed thereof intestate and without having been married. There will be an order that a proper deed shall be settled by the Judge.

I am of opinion that the costs both here and below ought to come out of the fund and not out of the general estate.

Howard:—

In *In re Gowan* (1) the costs came out of the residuary estate.

COTTON, L.J.:—

I do not think that right, and it does not appear from the report that the Master of the Rolls decided it.

LINDLEY, L.J.:—

I have nothing to say, but that I concur with the Lord Justice *Cotton*.

LOPES, L.J.:—

I agree that this will is to be read as giving instructions for a settlement, not as making a settlement, and I concur as to the provisions to be contained in the settlement.

Solicitors for both parties: *Winter & Co.*

(1) 17 Ch. D. 778.

H. C. J.

BOMPAS *v.* KING.

C. A.
1886
KAY, J.
Jan. 15.
C. A.
May 19, 20.

[1884. B. 835.]

Mortgagee in Possession—Block of Residential Apartments—Power to manage.

A mortgage of a large block of buildings, let out as residential apartments, contained an assignment of "the rents and profits" and a power to the mortgagees to enter on the premises in default of payment and "manage" and receive the rents and profits thereof. The deed contained no assignment of chattels nor any reference to existing arrangements with tenants, but the mortgagor covenanted to pay moneys expended by the mortgagees for any of the purposes thereby authorized. The block of buildings contained a common kitchen and *salle à manger* for the use of the inmates, and at the date of the mortgage the apartments were let to tenants under various agreements (made by a former mortgagee who had been paid off) by some of which the tenants stipulated for attendance and a supply of cooked food according to a tariff fixed by the manager. The interest being in arrear the mortgagees took possession of the building and continued to supply the tenants, whether they had special agreements or not, with attendance and cooked food, and managed the building at a loss. An action having been brought by the second mortgagee for an account:—

Held (affirming the decision of *Kay*, J.), that the first mortgagees were entitled in taking the accounts to be allowed the losses sustained by them in the management, not only out of the rents of the property, but out of the surplus proceeds of the sale of the property.

THIS was an action by the second mortgagee of a block of buildings in *Victoria Street, Westminster*, called "*The Members' Mansions*," belonging to Mr. *F. E. Ross*. The building consisted of about forty-five separate suites of rooms suitable for residence, with a large common kitchen and *salle à manger*.

Prior to the mortgage to the Defendants the building had been mortgaged to a company called "*The Midland Land and Investment Corporation*," who had entered into possession of the property. The company let out suites of rooms to tenants, and in many cases had written agreements with the tenants under which the company provided them with attendance and cooked food according to a tariff from time to time settled by Mr. *Ivory*, the company's manager. The food was cooked in the common kitchen, and was served either in the *salle à manger* or in the rooms of the tenants. In some cases, however, the rooms were let without any stipulation as to attendance or cooked food, and

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in other cases the stipulation related to attendance only. But in all cases, whether there were agreements or not, the manager was in the habit of supplying cooked food and attendance to the tenants when they required it. The furniture did not belong to the owner of the building, but was hired.

On the 23rd of June, 1881, the mortgage was paid off and the property sold and conveyed to *Ross*.

By an indenture dated the 24th of June, 1881, the mortgagor conveyed the block of buildings called "*The Members' Mansions*," and the appurtenances and the rents and profits thereof, to the Defendants, Sir *R. D. King*, the Hon. *A. F. Kinnaird*, and *S. A. Beaumont*, in fee, by way of mortgage, for securing the repayment of £55,000. The proviso for redemption stipulated that if the mortgagor should pay the mortgage debt of £55,000 with interest at the time and in manner therein mentioned, "and also all other moneys payable under these presents, together with all expenses relating thereto," then the mortgagees would reconvey the mortgaged property to the mortgagor. The mortgages also contained a proviso that until default the mortgagor might occupy and enjoy the mortgaged hereditaments, "and receive and take the rents and profits thereof" for his own use and benefit, and a proviso that if default should be made in payment of principal or interest, it should be lawful for the mortgagees "at any time or times thereafter, until any sale of the mortgaged hereditaments and premises as thereinafter mentioned, to enter into and upon and manage and receive and take the rents and profits of such mortgaged hereditaments and premises, or of so much thereof as should for the time being remain unsold, and, if necessary, to complete any buildings then thereon as might be thought fit, and to let the same or any part or parts thereof either from year to year or for any number of years, either in possession or reversion, at such rent or rents, either rack rents or otherwise, and either with or without taking any premiums for the same, and under such covenants &c. as the person or persons making such demises should think proper, and to enter into contracts and to accept surrenders of tenancies from any of the tenants thereof."

The deed did not convey any furniture or other chattels, and contained no reference to any agreements with the tenants.

The deed gave the mortgagees power "to appoint any person or persons receiver or receivers of such rents, with full power to collect, distrain for, and receive and give effectual receipts and discharges for the same."

It was further provided that any person or persons receiving such rents and profits under this present proviso, or any such appointment of a receiver or receivers, as the case might be, should and might, out of such rents and profits, when and as the same should be received, retain and pay all expenses in any way connected therewith, and all other outgoings in respect of the mortgaged hereditaments and premises, and also the interest payable on the mortgage debt, and all expenses whatsoever in any way relating thereto, and also a percentage to compensate the receiver, and should pay the surplus to the mortgagor, or, at the mortgagor's option, in or towards payment or reduction of the principal moneys which should for the time being be due, and of all expenses connected therewith. The mortgagor covenanted to repay to the mortgagees all moneys which they should lay out or expend for any purposes thereby authorized, with interest thereon after the rate aforesaid, from the time or respective times of paying the same moneys respectively, and that all such moneys, and interest for the same as last aforesaid, should be a charge or lien upon the mortgaged premises, which should not be redeemed or redeemable until payment should be made as well of such moneys, with interest thereon as aforesaid, as of the said principal sum of £55,000 and the interest thereon.

The mortgage contained the usual power of sale in case of default, and provided that the mortgagees should by and out of the moneys to arise by such sale, and also by and out of the rents and profits of the mortgaged premises, or any part thereof, after such default, in case they should think proper to receive such rents and profits, pay and discharge all or any outgoings or incumbrances, if any, in respect of the same premises or any part thereof, and enter into any arrangements for discharging such incumbrances, and also retain and reimburse themselves all such costs and expenses as they might expend in or about such sale or in recovering payment of the principal or interest of any money

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advanced or paid for buildings, repairs, or insurances, and should pay the surplus to the mortgagees.

On the 25th of June, 1881, *Ross* mortgaged the premises (subject to the mortgage to the Defendants) to certain persons, and this mortgage was transferred to the Plaintiff on the 26th of June, 1883.

On the 7th of October, 1882, the Defendants, as first mortgagees, entered into possession of the property, and remained in possession till the 13th of February, 1883, and during all that time they employed *Ivory*, the former manager, to receive the rents and manage the property. He continued to supply the tenants with cooked food and attendance as they had previously been supplied.

The amount expended by *Ivory* in managing the property and paying the working expenses generally, considerably exceeded the total amount received from the tenants for rent and for food and attendance supplied to them.

On the 13th of February, 1883, the Defendants sold the property under their power of sale to the Prince *de Bèarn* for £61,000. After paying the principal and interest due on their mortgage, and recouping themselves for the loss incurred in the management of the mansions, nothing remained in the hands of the first mortgagees.

In February, 1884, the Plaintiff, as second mortgagee, commenced the present action against the first mortgagees, claiming a declaration that they were not entitled to be allowed any loss incurred by them in consequence of their supplying cooked provisions and attendance, and an account against them on this footing, as mortgagees in possession, and for the payment of the balance of the purchase-money to the Plaintiff, as second mortgagee.

The action was heard before Mr. Justice *Kay* on the 15th of January, 1886.

W. Pearson, Q.C., and *R. C. Dobbs*, for the Plaintiff.

Hastings, Q.C., and *Frank Evans*, for the Defendants.

W. Pearson, in reply.

KAY, J.:—

The property mortgaged to the Defendants consisted of a set of mansions containing about forty-five sets of rooms, of which only about four were furnished. The property belonged at one time to the *Midland Land and Investment Corporation*, and they let and managed the property in this way: They had in the building a common kitchen and dining-room and they let suites of rooms to tenants who, I have no doubt, were tempted to take them by this circumstance, that provision was made for the general supply of food to the tenants, and there was a tariff which was fixed at what was called "moderate club prices." I have no doubt whatever that persons who took rooms were greatly induced to do so, and paid higher rents than they would otherwise have done, by reason of this advantage. The *Midland Land and Investment Corporation* carried on the business of the mansions in this way, and their manager has proved that they did this by having a form of agreement with the tenants which stipulated in so many words that the tenants should be supplied with cooked food to be served in their rooms or in the *salle à manger* of the building at certain prices. During the same time, while the *Midland Land and Investment Corporation* were owners of this property, it was also the practice to let people take suites of rooms, either for a short term or under a special agreement, which did not include that clause, and to allow those persons to have their food, if they wished it, at any time. After the property had been managed in this way it was sold to a Mr. *Ross* and conveyed to him on the 23rd of June, 1881, and Mr. *Ross* mortgaged it on the following day to the Defendants for £55,000. That mortgage contains a conveyance of the property and also a special power of entry and management. [His Lordship read the power, and continued:—] Observe that it is not only "enter and receive and take the rents and profits," but "enter and manage and receive and take the rents and profits." In construing that word "manage" I am of course bound to look at the condition of things existing when this mortgage was made, and the condition of things at that time and for years before had been that which I have been describing. So that that word "manage" has as plain a meaning as if it had been put in so many words that the mortgagees should upon

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their entering continue to manage the property in the same way as it had been managed up to that time. That provision gives the Defendants all those powers of management, including the providing of food and servants, and so on, which it had been the custom up to that time to employ. For a time the mortgagees did not enter, but they were put into possession on the 7th of October, 1882, and from that time they continued to carry on the same management, precisely as it had been carried on before, and they employed as general manager the very same gentleman who had been managing for the *Midland Land and Investment Corporation*. On the 26th of June, 1883, a second mortgage, which had been made on the 25th of June, 1881, was transferred to *Bompas*, the Plaintiff. Now, how is it possible for the Plaintiff to maintain his present contention? The first mortgagees have rendered an account to him, in which they have charged the expenses of management, and it seems that the management has not been in one sense profitable, for on the management there has been a loss. The Plaintiff, the second mortgagee, is asking that he may have the advantage of charging the Defendants with the receipt of all the rents which the tenants have paid, but that he may disallow and strike out of the Defendants' accounts all the loss from the management of the *Mansions*. Anything more utterly unreasonable or unjust could not be imagined. How am I to suppose that the rents would have been obtained on any other terms than those on which they were obtained? It seems to me that the moment the facts are thoroughly understood, the claim is so unjust on the part of the second mortgagee as to be absolutely extravagant. Therefore, in directing the usual accounts against the Defendants as mortgagees in possession, I declare, which is all I can do at present, that the Defendants, entering into possession as they did, were entitled under this power in the mortgage deed to manage the mortgaged premises in the manner I have described by supplying cooked food and attendance, as the *Midland Land and Investment Corporation* had been accustomed to supply them previously to the date of the Defendants' mortgage, both to persons who had express agreements that they should be so supplied, and to casual tenants who had no agreement of that kind.

The Plaintiff appealed from so much of the judgment as contained the above declaration. The appeal was heard on the 19th of May, 1886.

R. C. Dobbs, for the Appellant:—

The mortgagees claim to be allowed the expenses of managing the *Mansions* as a business, and to recoup themselves the losses they sustained on the food and attendance in carrying on the business not only out of the rents, but out of the capital. They are not entitled to do this. The mortgage only included the land and building as real estate, and although they had power to "manage," that only referred to the management of the property as a building, as the payment of rates and repairs. The furniture and chattels used in the business were not included in the mortgage, and it was never intended that the mortgagees should undertake the management of the business. If mortgagees in possession may conduct such a business as this, they would be justified in carrying on any other kind of business on the mortgaged premises, and charging the losses against the capital. There is no authority for such a proposition.

Hastings, Q.C., and *Frank Evans*, for the Defendants:—

The mortgage deed contained an express power to manage the property, and not only to receive the rents and profits. The mortgagees were bound by the agreements of the tenants and the custom of the *Mansions*, which had been managed in this way for many years. They could not take the rents from the tenants and at the same time refuse to carry out the agreements with respect to supplying cooked food and attendance. The special nature of the business rendered it impossible for the mortgagees to manage the building without managing the business. If they had made profits they would have had to be accounted for as capital, and in the same way they have a right to deduct the losses from the capital.

R. C. Dobbs, in reply.

1886. May 20. COTTON, L.J.:—

This is an appeal by the Plaintiff from part of a judgment given by Mr. Justice *Kay* on the hearing of the action, and the

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question which we have to decide arises in this way. Property of a peculiar character was mortgaged to the Defendants. It was a sort of private club; the establishment or house being divided into suites of apartments for separate occupation by the tenants, who, however, had a common dining-room where they might eat their dinners and take their other meals if they desired. The part of the judgment which is appealed from is a declaration that the first mortgagees, that is, the Defendants *King, Kinnaird,* and *Beaumont,* "on entering into possession of the premises in the said judgment mentioned on the 7th of October, 1882, were, under the power to manage the said premises contained in the indenture of mortgage in the said judgment mentioned, entitled to supply food and attendance to the lessees and tenants of the said premises in the same manner as the *Midland Land and Investment Corporation, Limited,* in the pleadings named, had been accustomed to do previously to the 23rd of June, 1881," that being the date of the sale by the corporation to the Defendant *Ross.*

The *Midland Land and Investment Corporation* had been mortgagees with a power of sale, and they had been mortgagees in possession, and it is in evidence that they had done with reference to this building what was afterwards done when the Defendants *King, Kinnaird,* and *Beaumont,* the first mortgagees from *Ross,* took possession. The property consists of a large block of buildings in *Westminster* called "*The Members' Mansions.*" No one person leased or occupied the whole of it, but it appears that there were some forty-four suites of apartments in it, and some of the persons who occupied the apartments before the present Defendants had anything to do with the matter, entered into contracts with the owners, not only that they should have apartments, but that they should pay also a certain sum for being provided with food and attendance. There was only one common kitchen for the occupiers of those apartments, and I have already said that there was one common room—coffee-room or dining-room. The members who occupied apartments might, if they liked, have their dinners in the common dining-room, or they might be served in their own rooms with dinner. Some of the persons who occupied apartments contracted also that they should be supplied with food at certain specific rates, while others had

agreements containing no provisions at all with regard to their food, but merely stipulations that they should be provided with attendance. But even these tenants did go down to the common room and had the use of the kitchen, and were served in the common dining-room with dinners, just as is done in a club. At the time when the first mortgage from *Ross* (who bought from the *Midland Land and Investment Corporation*) was made, there were in existence no less than eleven contracts which had been already made with tenants and lessees of apartments, stipulating that they should be provided during their tenancy not only with attendance but with food. The building was not one which could be let to any one person to occupy the whole of it, unless he intended to let out the apartments in the way I have mentioned, and to carry it on, as it were, in the position of a hotel-keeper or the proprietor of a residential club. That was the character of the buildings, and one must consider now what the mortgage was, because Mr. Justice *Kay* has held that under the powers contained in the deed there was authority to carry on the management of this block of buildings in the same way as it had been previously carried on by the *Midland Land and Investment Corporation.*

It is said that this expenditure on the coffee-room, for attendance and for food, consumed all the rents which were received from the apartments, and that it is probable that after all the rents are exhausted a further sum will have to be deducted from the capital produced by the sale of the property.

There are two questions: first, whether this expenditure ought to be allowed as against the rents so far as they will go; and secondly, whether the balance of the expenditure not provided for by the rents should be allowed as against the capital moneys produced by the sale. Without going minutely into the details of the deed, it is sufficient to say that, as regards the account of rents, we think it is impossible that these rents could have been recovered unless the account were dealt with on the footing of the building being managed in the way it had been previously dealt with, for of course no one would take apartments in a building of this kind unless he was provided with attendance and food, either in his own apartments or in the common dining-room. But the

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question with regard to the capital moneys arising from the sale is of course different; and, unless there is something in the deed which justifies the expenditure in reference to providing food and attendance, the expenditure, in my opinion, cannot be allowed as against the capital moneys. With regard to profits, clearly profits could not have been obtained without this expenditure, and of course, in allowing expenditure, all that must be allowed which was incidental and necessary for the purpose of obtaining the profits; and therefore it is not necessary to consider this mortgage-deed in reference to the question of profits. It is only necessary to consider it with reference to the question whether, if there is any balance of purchase-money remaining after paying principal and interest, that ought to be allowed to the first mortgagees on account of this expenditure. The mortgage is dated the 24th of June, 1881, the day after *Ross* had bought from the *Midland Land and Investment Corporation*, who had managed it exactly as it had been managed before, and who had eleven agreements with tenants who were to be provided with food and attendance. It mortgages a building which it calls "*The Members' Mansions.*" It does not say how the building was used, but calls it by that name, which indicates that it was not an ordinary dwelling-house, and the fact was apparently well-known, and was not indeed disputed, that it was used and occupied in the way which I have already stated. Again, the parcels of the mortgage are not only the building itself called "*The Members' Mansions,*" but "the rents and profits thereof." Now, that is very unusual, and I think tends to shew that the mortgagor and mortgagees were not contemplating that this building was to be dealt with as an ordinary building. Then there is a provision that if default is made in payment of either principal or interest, it shall be lawful for the mortgagees to enter and manage. [His Lordship read the power, and continued:—]

Now what is meant by that. To my mind it must have reference to the mode in which this building had been dealt with by the previous mortgagees who had sold to *Ross*, who had mortgaged it to the Defendants in this action. The reference to that is made more pointed by what follows, viz. the power to let the same or any part or parts thereof, and to enter into contracts

and to accept surrenders of contracts from the tenants thereof. There was power, therefore, not only to let the building as a whole to anyone who liked to carry on the business of the building as a whole, but to let any part thereof; and not only to make contracts, but to accept surrenders of any of the then existing tenancies. That, to my mind, appears to provide for the carrying on of this business upon this block of buildings in the same way as that in which it had been previously carried on.

Then another part of the deed which I think it necessary to refer to is a covenant by *Ross*, the mortgagor, that he would repay the mortgagees, their heirs, &c., "all moneys which they may expend for any purpose hereafter authorized with interest thereon." I refer to that, not because it in any way assists us in saying what the purposes authorized were, but because it is material with reference to the question whether the money expended can be allowed out of the proceeds of sale; for there is a direction as to how that money is to be applied, which, in my opinion, does not point to the expenditure in respect of providing food for the tenants living in this house. But in my opinion a purpose had been already authorized by the direction to manage, which must be taken with what follows that direction or authority to manage. The mortgagor has covenanted to repay what has been expended for that purpose, and therefore he could not possibly claim (nor could the second mortgagees claim to recover) any part of the sale moneys without providing for what he would have been compelled to pay under his covenant. When he had contracted to repay any expenditure that was required for the management he could not say, "I will require you to hand over the balance to me," without allowing for this expenditure.

One matter which pressed upon me for a considerable time was this; if it was intended that there should be a mortgage of this block of buildings with authority to carry on the dining-room and kitchen in the same way as they had been previously carried on, it seems remarkable that there is no mention of the chattels necessary for that purpose. But it appears that those chattels were in substance hired, and therefore did not belong to the mortgagor *Ross;* and that accounts for the fact that, although in my opinion this mortgage does give authority to conduct the

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business, and to manage this block of buildings with the business carried on upon it as it had been carried on immediately previously to the time when the mortgage was completed, the chattels are not mentioned; the non-reference to the chattels is therefore explained by the fact of the mortgagor not really having any power over them. In my opinion, therefore, the decision of Mr. Justice *Kay* is right, and the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. This is a redemption action brought against first incumbrancers by a second mortgagee, and Mr. Justice *Kay* has made the special declaration to which the second mortgagee objects; and in order to decide whether his objection is well founded or not, it is of course necessary to look to the mortgage under which the first mortgagees claim, and see what was mortgaged to them and what their powers are under that deed. Now, Mr. *Dobbs*, who argued the case extremely well, has pointed out several flaws in that deed. It certainly is not a very well-drawn deed, and there are several things in it which might have been expressed in a much plainer way than they are; but, at the same time, before we approach the construction of the language of the deed, it is essential that we should understand what the property mortgaged was. For that purpose we must look a little outside the deed itself. The property mortgaged was this block of buildings called "*The Members' Mansions*," and the mode in which those *Members' Mansions* had been let and managed has been described by Lord Justice *Cotton*. Although it is very true that the mortgage does not extend to the goodwill of the *Mansions*, or of the hotel business, or the boarding-house business, or whatever you may call it, which was carried on there, and does not contain any assignment of the chattels, furniture, and so on, yet the absence of those things is explained in this way, that they do not appear to have belonged to the mortgagor at all. It appears that they were hired, and, naturally, therefore, they were not inserted in the deed. We have here, therefore, a deed, the meaning of which we have to determine, which is confined to the *Mansions* themselves. But curiously enough, the property mortgaged does not consist of the houses merely, but it includes also

"rents and profits," which in ordinary mortgages are not usually referred to. There were profits arising from the business carried on; and that fact throws a little light on the meaning of the parcels and also upon the clause which contains the words about accepting surrenders of contracts and entering into contracts. These observations lead to the conclusion that the mortgagees, when they entered into possession of the premises, as they were entitled to do upon default of payment, were entitled to manage that business. We must give some effect to the words, and I cannot give any effect to them short of that which has been given to them by Mr. Justice *Kay*. It appears to me that the conclusion which he has arrived at, after carefully spelling through the whole deed, as to the proper construction of it, is the only one that is consistent with the whole deed—consistent with the management clause, with the expression as to rents and profits, and with the other expressions with regard to expenditure, which were no doubt put in for a purpose. It appears to me, therefore, in taking this account, that it would not be right to say to the first mortgagees, "You are not entitled to bring into account, either as against the rents and profits, or as against surplus proceeds of the sale, what was expended upon this property while it was being managed by you in the way which it had been previously managed." I think, therefore, that the appeal fails and ought to be dismissed with costs.

LOPES, L.J.:—

I entirely agree, and I have nothing to add.

Solicitors for Appellant: *Newman, Hays, & Co.*
Solicitors for Respondents: *Burrows & Barnes.*

M. W.

C. A.
1886
V.-C. B.
May 28.
C. A.
June 11.

THOMAS *v.* TURNER.

[1886. T. 548.]

Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 13, 24 [*Revised Ed. Statutes, vol. viii., pp.* 1152, 1153, 1156, 1159]—*Copyright in Book—Non-registration of first Edition—Registration of subsequent Edition—Reprint of former Edition.*

The Plaintiff in an action for infringement of copyright in a book, the first edition of which was published in November, 1881, had not, before commencing such action, registered at Stationers' Hall either the first or a second edition which he had subsequently published; but he had registered a third edition, which was in fact a reprint of the first edition, describing it in the entry as a third edition, and giving the time of the first publication as the 22nd of April, 1885, which was the date at which the third edition was published:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff had not truly stated the time of the first publication of his book within the meaning of sect. 13 of the *Copyright Act*, 1842, and consequently had not caused entry to be made of his book pursuant to the Act, and was precluded by sect. 24 from maintaining any action for infringement of copyright until he had made due and correct entry pursuant to sect. 13.

ACTION for infringement of copyright.

The Plaintiff, *William Thomas*, a chemist, in *Talbot Road, Bayswater*, published in November, 1881, the first edition of a book entitled "*Thomas's* Medical Companion, with Complete Price List," and in November, 1884, he published a second edition of the same book. He never registered at *Stationers' Hall* either the first or the second edition; but on the 22nd of April, 1885, he published a third edition of the book which, he admitted on cross-examination, was a mere reprint of the first edition, with some immaterial omissions, and on the 13th of November, 1885, he registered that edition at *Stationers' Hall*, giving, in the entry in the registry book of the *Stationers' Company*, as the title of the book: "*Thomas's* Medical Companion, with Complete Price List, Third Edition," and as the date of the first publication "the 22nd of April, 1885."

In April, 1886, he brought this action against the Defendant, who was a chemist carrying on business at *Finchley*, and in his

statement of claim he alleged that he was the original proprietor of a subsisting copyright in a book entitled "*Thomas's* Medical Companion, with Complete Price List, Third Edition," duly registered and entered at *Stationers' Hall*, and that the Defendant had infringed his said copyright by publishing a number of copies of a book entitled "*Charlton Turner's* Medical Companion, with Complete Price List of Drugs, &c.," which was, he alleged, a colourable imitation of his book; and he claimed damages for infringement of copyright, and an injunction to restrain the Defendant from publishing such book, and from publishing "the Plaintiff's said book entitled '*Thomas's* Medical Companion, with Complete Price List, Third Edition,' or any part thereof, or any colourable imitation thereof."

The Defendant by his statement of defence disputed the Plaintiff's copyright, and pleaded (*inter alia*) that if the Plaintiff had any copyright in his book, the same had not been duly registered in accordance with the statute 5 & 6 Vict. c. 45, or duly entered at *Stationers' Hall*, the date of the first publication thereof being untruly stated in the register.

On the 28th of May, 1886, the Plaintiff moved before Vice-Chancellor *Bacon* for an injunction to restrain the Defendant until the trial of the action from continuing the publication of "*Charlton Turner's* Medical Companion."

The material sections of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), are sufficiently stated in the arguments before the Court of Appeal, and in the judgment of Lord Justice *Cotton*.

Marten, Q.C., and *Harry Nash*, for the Plaintiff.

H. Terrell, for the Defendant, took the preliminary objection that the Plaintiff had not stated truly the date of the first publication of his book, and consequently could not maintain his action. He cited *Mathieson* v. *Harrod* (1) and *Black* v. *Murray* (2).

BACON, V.C.:—

A man writes a book but does not register it under the *Copyright Act;* he has therefore no copyright upon which he can sue.

(1) Law Rep. 7 Eq. 270. (2) 9 Court Sess. Cas. 3rd Series, 341.

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He may publish twenty editions of the book, and yet, by failing to register, may have no copyright in the first nineteen editions for the infringement of which he can maintain an action; but if he registers the twentieth he thereby acquires the right to sue for an infringement of his copyright. Here the Plaintiff registers the third edition of a book called "*Thomas's* Medical Companion," and he says that, and no other, is the first publication of the work. In my opinion the Plaintiff has complied with the requirements of the statute, and has therefore acquired the right to sue for an infringement of the third edition of his work.

Upon the merits of the case his Lordship granted an injunction restraining the infringement.

G. I. F. C.

C. A.

From this decision the Defendant appealed. The appeal was heard on the 11th of June, 1886.

H. Terrell, for the Appellant:—

The 13th section of the *Copyright Act*, 1842, empowers the proprietor of copyright in any book to make entry in the register book of the *Stationers' Company* of (*inter alia*) "the title of such book" and "the time of the first publication thereof;" and the 24th section of the same Act prohibits him from maintaining any action for infringement of copyright unless he shall before commencing it have caused an entry to be made of his book "pursuant to the Act."

The Plaintiff in this case has not entered truly and correctly the time of the first publication of his book, for the date he has entered is that of the publication of the third edition of the book and not the date of the first edition, which I say is the date on which the book was first published. The third edition is not in any sense a new book, but is substantially the same as the first. The Plaintiff accordingly cannot maintain this action.

[He referred to *Low* v. *Routledge* (1); *Mathieson* v. *Harrod* (2); *Page* v. *Wisden* (3); *Black* v. *Murray* (4); the *Copyright Act*,

(1) 33 L. J. (Ch.) 717, 723.
(2) Law Rep. 7 Eq. 270.
(3) 17 W. R. 483.
(4) 9 Court Sess. Cas. 3rd Series, 341.

1842 (1), and *Copinger* on Copyright (2); *Coote* v. *Judd* (3); *Dicks* v. *Yates* (4).]

Harry Nash, for the Respondent:—

By sect. 2 of the Act of 1842 the word "book" includes "every volume, part, or division of a volume" . . . . "separately published," and I submit that each edition is a book within the meaning of the Act, and may be registered with its time of publication under sect. 13.

[COTTON, L.J.:—The person registering has to register a book in which he has a copyright.]

Sect. 24, which makes registration a condition precedent to the maintenance of an action for infringement, does not affect copyright, but only the right of the proprietor of copyright to sue, and though the registration of a third edition will not, I admit, entitle the owner of the copyright to sue in respect of the first or second edition, it will, I contend, entitle him to sue in respect of the third.

No difficulty arises from the use of the expression "first publication" in sect. 13, for it was probably introduced to meet the case of books, such as serials, in parts or volumes, which are not all published at one time.

[LOPES, L.J.:—The date of the "first publication" has not been here entered at all.]

The time of the first publication of this particular book has been entered, for each edition is a separate book and unconnected with the previous editions so far as registration is concerned.

[COTTON, L.J.:—That may be so if each edition subsequent to the first is substantially a new work so as to be the subject of a fresh copyright, but not if the subsequent editions are merely reprints or new types. Sects. 3 and 13 must be construed together, and you must look back to see in what book the person coming to make the entry has copyright, otherwise by means of successive editions the copyright in the original work might be made to run on for ever.]

(1) Sects. 2, 3, 11, 13, 24.
(2) 2nd Ed. p. 135 *et seq.*
(3) 23 Ch. D. 727.
(4) 18 Ch. D. 76.

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Any edition may, I submit, be registered, though the same edition may not be registered twice; and the time of the duration of the copyright will run from the date of the publication of the edition registered.

H. Terrell, in reply:—

Taking the material sections of the Act together the word "book" means "work," whatever the binding, type, or price, and not "edition:" and "the time of the first publication" is the time of the first publication of the work in which the person causing the entry to be made is entitled to copyright. Under sect. 3 the duration of the copyright dates from the date of the first publication. To hold that each reprint is a fresh work would enable an author by from time to time reprinting his work to acquire a perpetual copyright.

[He referred to *Hedderwick* v. *Griffin* (1).]

COTTON, L.J.:—

This is an appeal from an order made by Vice-Chancellor *Bacon* granting an interlocutory injunction to restrain the Defendant from infringing the Plaintiff's copyright. An objection has been taken that the Plaintiff has not duly registered his book in accordance with the *Copyright Act*, 1842, 5 & 6 Vict. c. 45, and we must dispose of that objection in the first instance.

The question depends upon the construction to be put upon various sections of the Act. Taking first sect. 24, that section provides, reading it shortly, "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit . . . . in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding have caused an entry to be made, in the book of registry of the *Stationers' Company*, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid." It will therefore be necessary to ascertain what is the meaning of the expression "such book," and

(1) 3 Court Sess. Cas. 2nd Series, 383.

what is the nature of the registration which is required, or, in other words, "the entry to be made in the book of registry of the *Stationers' Company* of such book pursuant to the Act." Now the entry which was in fact made was as follows:—[His Lordship read the entry, and continued:—] So that this is an entry in the registry of a third edition of this work, and the date of publication is given as the 22nd of April, 1885, which is the day on which the third edition was in fact first published. The work itself was not, however, first published on that day, but was first published in November, 1881, and the objection is that "the time of the first publication" of the book is not correctly stated in the register, and that this disables the Plaintiff from maintaining his action.

It is said in answer to the objection that it is enough to register this third edition with the date of its publication in order to give the Plaintiff a copyright therein upon which he can maintain an action for infringement. But let us see what this third edition is—for editions vary. Sometimes a new edition is substantially a new work; on the other hand, a new edition may be, and often is, simply a reprint, and in no sense a new work. Now upon the evidence in this case this third edition is a mere reprint with some immaterial omissions of that which was published in November, 1881; and it is accordingly contended that under these circumstances the entry in the registry is bad as not being "pursuant to the Act."

Recurring, then, to the Act, and looking first at sect. 3, which fixes the duration of the copyright, we find that the copyright in every book which shall be published in the lifetime of the author is to endure for the life of the author and the further term of seven years from his death, but if the term of seven years shall expire before the end of forty-two years "from the first publication of such book," the copyright is in that case to "endure for such period of forty-two years;" and the copyright in every book which is published after the death of the author is to endure for the term of forty-two years "from the first publication thereof." Then sect. 13 enacts "that it shall be lawful for the proprietor of copyright in any book . . . to make entry in the registry book of the *Stationers' Company* of the title of such book, the time of the first publication thereof," and certain other particulars,

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according to a form given in the schedule to the Act. It is now material to inquire what is meant by the word "book," because it is contended that, inasmuch as the interpretation clause (sect. 2) says that "the word 'book' shall be construed to mean and include every volume, part, or division of a volume, pamphlet," and so on, "separately published," so a third edition, being a volume separately published, is a book within the meaning of the Act, and can be registered under sect. 13 within the meaning of sect. 24.

But that is not correct. Taking the material sections of the Act together, what is to be registered under sect. 13 is that in which there is to be a copyright under sect. 3—not every letter in a volume, part, or division of a volume, but the work of which the person causing the entry to be made is the author or the proprietor of the copyright.

That being so, there has not been, in my opinion, a due compliance in this case with the requirements of the Act as to registration. For the third edition, which the Plaintiff has entered as first published on the 22nd of April, 1885, is a mere reprint of a work first published in November, 1881, and therefore, although as a volume separately published it may come within the definition of the word "book" contained in sect. 2, it is not a book in which there can be any copyright, as distinguished from the original work, which is entitled to registration. Various cases have been referred to in which it has been held that omission to register correctly the time of the first publication is fatal to the right to sue in respect of an infringement of copyright. But although the Plaintiff fails to maintain this action, he may have a copyright in the original work, and he can, of course, still register correctly, if he chooses, the time of the first publication of it, but he cannot sue in respect of any infringement until he has duly and correctly made entry pursuant to the Act. I cannot, therefore, agree with the view which the Vice-Chancellor has taken, and the order made by him must be discharged.

LINDLEY, L.J.:—

The real question in this case is whether there has been such a registration of this book as is a compliance with sect. 13 of the *Copyright Act* of 1842. If so, the Plaintiff can maintain this

action; if not, then, according to sect. 24, he cannot. When the facts are ascertained, it is plain that the thing which the Plaintiff calls a third edition is not a new work at all but a mere reprint of an old one. And, in my judgment, the question turns upon the consideration whether or not the time of the first publication of this book can be truly described as the 22nd of April, 1885. To my mind it cannot. The work was first published in November, 1881. That is admitted by the Plaintiff himself. If so, there has not been a compliance with the Act; for the time of the first publication of the book has not been entered.

If the book entered had been partly old and partly new, there might have been a compliance with the Act *pro tanto*, but the entry would not have given the Plaintiff a copyright for a fresh period of forty-two years for the part which was old. The appeal must be allowed.

LOPES, L.J.:—

The 13th section of the *Copyright Act* of 1842 requires an entry to be made, amongst other matters, of the time of the first publication of a book. The object is, no doubt, to fix the time from which the forty-two years, which is the period of duration of a copyright, are to run. Beyond all question the time of the first publication of this work was November, 1881, and that time has not been registered. What has been registered is the time of the publication of a third edition, which is admittedly a reprint of the first edition published. It cannot, under these circumstances, be said that what is here entered is the time of the first publication of this book. Had this new edition been practically a new work, the result might have been different. As it is, the appeal must be allowed with costs.

Solicitor for Appellant: *E. Upton.*
Solicitor for Respondent: *R. T. Webster.*

W. W. K.

C. A.
1886
July 10, 12.

In re GARNETT.
ROBINSON *v.* GANDY.

[1881 G. 950.]

Marriage Settlement—Wife's after-acquired Property—Covenant to settle—Release by Wife in Mistake before Marriage.

By marriage settlement in 1859, which recited that the wife was absolutely entitled, amongst other property, to £10,000, part of her share of the residue of *A.*'s estate in the hands of the executors of his will, and secured by a mortgage, and that it had been agreed that the intended husband and wife should enter into covenants for the settlement of the future real and personal estate of the intended wife, this £10,000 was settled, and the husband and wife, in pursuance of the said recited agreement, covenanted with the trustee for the settlement of all the estate, property and effects, exceeding £300 at one time, which the husband and wife, or either of them in her right, should at any time or times subsequent to the marriage and during the coverture become seised or possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement the intended wife, then *sui juris*, had, in consideration of the payment of £10,500, executed to the executors of *A.*'s will a general release of all her claims as residuary legatee. The release was executed by the intended wife without independent advice, and in ignorance that her share of residue was worth considerably more than £10,500.

On the 10th of February, 1885, while the coverture was still subsisting, an order setting aside the release was made by the Court of Appeal (1):—

Held, that the covenant to settle after-acquired property did not apply to any existing property to which the wife was entitled at the moment of marriage other than the £10,000; but (reversing *Kay*, J. (2)) that the setting aside the release of 1859 did not confer any new title, but merely removed a bar to the assertion of a pre-existing title, and accordingly that the additional residuary property could not be treated as first acquired when the release was set aside, so as to be bound by the covenant.

Williams v. *Mercier* (3) distinguished.

APPEAL from Mr. Justice *Kay*.

The facts are fully stated in the reports of the case on previous occasions (see *In re Garnett, Gandy* v. *Macaulay* (4); *In re Garnett, Robinson* v. *Gandy* (5)).

(1) 31 Ch. D. 1.
(2) 31 Ch. D. 648.
(3) 10 App. Cas. 1.
(4) 31 Ch. D. 1.
(5) 31 Ch. D. 648.

Sir *H. Davey*, S.G., and *W. Pearson*, Q.C. (*Shebbeare* with them), in support of the appeal by Mrs. *Gandy* and her husband:—

The effect of the decision of the Court of Appeal (1) that the release of the 26th of September, 1859, was not binding on Mrs. *Gandy* and her sister as a release of their whole interest under the will of *Jeremiah Garnett* in his residuary estate, was mistaken by Mr. Justice *Kay*, who, while holding that the covenant applied only to future property and did not include property (other than the £10,000) to which these ladies were entitled at the moment of marriage, has treated the additional property representing that interest as having first come into existence, or into possession, when the release was set aside, and held accordingly that such property was after-acquired property within the meaning and intention of the covenant contained in the settlements. A release, though general in terms, will both at law and in equity be limited in operation to matters known and contemplated by the parties at the time of its execution: *Lindo* v. *Lindo* (2); *Turner* v. *Turner* (3); *Lyall* v. *Edwards* (4); and the effect of the decision of the Court of Appeal was not to create any new title in Mrs. *Gandy* and her sister as from that date, but to remit them to those rights which in truth they took *ab initio* under the will of *Jeremiah Garnett*, and were therefore entitled to in possession at the time of their respective marriages. The recital and the covenant in the marriage settlements point clearly to future property to which each lady should become entitled at any time or times subsequent to her marriage. But even if it should be held, in accordance with Mr. Justice *Kay's* decision, that this larger sum is an interest which has accrued after marriage, the income ought not to be treated as capital sums falling in when the release was set aside and consequently as bound by the covenant.

Williams v. *Mercier* (5), which was relied on as shewing that although this property belonged to the ladies at the time of the marriage it was still bound by the covenant of the husband as property to which he became entitled *jure mariti* from the moment when the coverture began, does not apply.

(1) 31 Ch. D. 1.
(2) 1 Beav. 496.
(3) 14 Ch. D. 829.
(4) 6 H. & N. 337.
(5) 10 App. Cas. 1.

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Hastings, Q.C., and *Ingle Joyce*, for Mrs. *Garnett Orme*:—

The recitals in the marriage settlements of *Mary Hester* and *Frances Orme* that they were entitled "amongst other property to a sum of £10,000," shew clearly that they were at the time possessed of or entitled to property which was not intended to be included in their settlements.

Robinson, Q.C., and *W. C. Druce*, for the trustees of Mrs. *Gandy's* settlement:—

This property was an equitable *chose in action*, the title to which accrued to the husband in his wife's right immediately upon the marriage, that is during the coverture, and would become absolute by reduction into possession: *Langham* v. *Nenny* (1), and therefore is within the covenant by husband and wife to settle all property "which the said *Henry Gandy* and the said *Frances Orme* or either of them in her right shall at any time or times subsequent to the solemnisation of the said intended marriage, and during the said intended coverture become seised or possessed of or entitled to &c., &c.," as property to which at the moment that the marriage was complete the husband became entitled in right of his wife: *Williams* v. *Mercier* (2). Effect cannot be given to the recitals of an agreement "to enter into such covenants for the settlement of the future real and personal estate" so as to control the operation of the covenant, and in effect introduce a new covenant: *Young* v. *Smith* (3). The recitals can only be looked to in order to ascertain what the parties had in their mind when they entered into the covenant; and here it is conceded that so far from there being any intention to exclude this property, the settlement was entered into in disregard or necessary ignorance of its existence.

We do not make any claim to the interest that has accrued subsequent to the death of *Henrietta Garnett* in 1879.

[They also cited *Lewis* v. *Madocks* (4).]

Robinson, Q.C., and *R. J. Parker*, also appeared for the trustees of Mrs. *Garnett Orme's* settlement.

(1) 3 Ves. 467.
(2) 10 App. Cas. 1.
(3) Law Rep. 1 Eq. 180.
(4) 17 Ves. 48.

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COTTON, L.J. (after stating the facts, continued) :—

When the Court of Appeal had determined that the release executed by these ladies on the 26th of September, 1859, was not to be treated as binding so far as regarded what had not been accounted for by the aunt, the question arose whether the sum of £28,000 was or was not comprised in the settlement under the covenant which has been referred to. Mr. Justice *Kay* determined that it was, and on the ground that he considered it was future property; that is to say: the Court of Appeal having made a declaration that the release cannot bind them beyond £10,500, and did not preclude them from claiming as against this estate the sum of £28,000, he held that the right to these additional sums only accrued when the Court had set aside the release which had been executed by these ladies, and that, therefore, the property, being future property, came within the words of the covenant; he being of opinion that the covenant did not apply to any property which then belonged to these ladies. I must say I cannot agree with Mr. Justice *Kay* in his view that this was future property. The setting aside of the release did not give them any new right, but merely had the effect of removing that which, if it had stood, would have been a bar, and have prevented their previously existing right to assert their title to the residuary personal estate of their uncle, *Jeremiah Garnett*, unaccounted for—a right which they had at the time the settlements were executed, and a right which was not obtained by them in consequence of the release having been set aside. I cannot, therefore, agree with the view taken by Mr. Justice *Kay*. But then we have this question: does the covenant, which was to be found in each of these settlements, apply to property which was then, although unknown, vested in the ladies. [His Lordship referred to the covenant.] It is said (and that was Mr. *Robinson's* argument) that the husband's right to this property accrued by the marriage, and that this covenant was intended to apply to that which he became possessed of in right of his wife, and in fact reduced into possession during the coverture. It was further said, on the authority of *Williams* v. *Mercier* (1), that these words here apply to everything to which, after the marriage, the

(1) 10 App. Cas. 1.

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husband had any right in right of his wife; and that immediately after the marriage he became *de novo* entitled to a right in respect of this, and that it was intended to bind that property. It is obvious that at the date of the settlement none of the parties knew of the existence of this property, and Mr. *Robinson* did not contend that they intended to settle it, but he says this covenant in its terms comprises all property that the wife had, because the husband had gained a new right immediately the coverture began; and that the word "possessed" shews that it was intended to apply to such property as the husband should be able to reduce into possession. I think the word "possessed" must be taken with the other words "become seised of, or possessed of, or entitled to." The covenant applies to real and personal property; and "possessed" is the proper word for the personalty, and "seised" for the realty. I do not think that "possessed" was intended to have that meaning which was attributed to it in argument, but one has to see whether this can apply to the present property of the intended wife. I am of opinion it does not. The words of the covenant are at least doubtful, and, if doubtful, then we may and ought to look at the recitals, and one does find there that in each settlement there is a recital that the ladies are entitled, among other property, to certain property which is to be settled, and then there is also the recital, that it had been agreed that the husband and wife should enter into such covenants for the settlement of the future real and personal estate of the said ladies as are thereinafter contained. But it is argued that it is only such a covenant as is thereinafter contained, and it is said that we must not look at the recital unless the covenant is doubtful; but, in my opinion, it is doubtful, and the covenant is described as a covenant for the settlement of the future real and personal estate. The covenant which is doubtful, and the reference in the recital both to other property then possessed, and also to the agreement that he was to enter into the covenants for the settlement of future property, all point to this, that only so much of the then existing property as was mentioned was intended to be settled, and, in my opinion, will prevent the covenant from applying to property of the ladies which they then were entitled to, although at the time its existence was not known.

Then reliance is placed by the trustees (the Respondents) on the case of *Williams* v. *Mercier* (1). But, in my opinion, that case must have turned on this, that the covenant there was the only part of the instrument which could bring into settlement the property to which the wife was entitled at the date of the settlement. There were words in the settlement declaring the trusts of the money to arise from the sale of certain chattels, which refer to the settlement contained in the proviso as to that property to which the intended wife was then entitled, and that could not be found anywhere except in this covenant; and there being a great variance in the words, their Lordships held, affirming the Court of Appeal, that the covenant did apply to the then present property of the lady. The words of the settlement, but unfortunately not the whole of the settlement, are set out in the House of Lords report (2), and there is also a reference to the trust of the money to arise from the sale of certain property. What I gather from the report, although the settlement is not set out, is confirmed by the recollection of Lord Justice *Lindley*, that there was nothing in the settlement, except the covenant, which could affect the then present property of the ladies. The interpretation of the covenant, and the fact I have last mentioned, are alluded to in the judgments both of Lord *Blackburn* and Lord *Bramwell;* and, I think, also alluded to by the then Lord Chancellor, Lord *Selborne.* Having regard to the context, and having regard to the terms of the settlements, it was held to apply to property which the intended wife had at and immediately before the date of the settlement. In my opinion that is not the true construction of this covenant and of this settlement, having regard not only to the covenant but to the contract. We cannot guess what the parties would have done if they had known it. We have to construe the covenant, and we do not think that the covenant did affect, or was intended to affect, any then existing property of the intended wife, even though its existence was not known, beyond the particular sum therein mentioned. In that respect we agree with Mr. Justice *Kay*, but, as already stated, the appeal must be allowed.

(1) 10 App. Cas. 1. (2) 10 App. Cas. 2.

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LINDLEY, L.J.:—

I am of the same opinion. Upon the question of construction I confess I do not see any reason to differ from the view taken by Mr. Justice *Kay*. It is almost impossible to read the whole of this settlement together, including the recital, without seeing that the construction contended for by the trustees is at variance with the scheme of the settlement itself. The introduction of the word "future" is striking. What is it put in for, except for the express purpose of negativing the idea that the settlement would operate on the then present property of the wife beyond that actually mentioned? It is useless, unless it is for that purpose. When you look at the recital and see that it is express, that the lady was possessed of or entitled to other property—beyond the £10,000, and that further recital as to the covenant to settle her future property as thereinafter mentioned, all doubt, if there was any doubt, disappears, and it appears to me perfectly impossible, without ignoring some of the most important words of this deed, to say that this covenant applied to any property which the lady had beyond the £10,000 actually settled, or to hold that this existing property was intended to be settled. So far we all agree with Mr. Justice *Kay*. Then Mr. Justice *Kay*, taking that view of the settlement, decided in favour of the trustees upon the ground that the husband in her right did acquire, or become entitled to, or possessed of, the property in question by reason of the circumstance that the release which had been given prior to the marriage was set aside by this Court, and that the setting aside of the release was the acquisition of some fresh title. With great deference to the learned Judge I cannot take that view. Setting aside a release confers no new title. It removes an impediment to the enjoyment of a pre-existing title. The lady did not acquire a title when the release was set aside. She always was entitled notwithstanding the release. It appears to me the appeal ought to be allowed.

LOPES, L.J.:—

With regard to the construction of the covenant I agree with the decision of the learned Judge. I think the covenant did not

apply to any personal property which the wife had at the moment of the marriage. The words which appear in the covenant seem to my mind really to shew that that is its meaning; and if I had to decide the construction of the covenant upon the words of the covenant alone I should come to that conclusion. But assume the covenant to be equivocal, we are then permitted to look, and in point of fact we ought to look, at the recitals to see if they throw any light on the covenant. If the covenant is equivocal and the recital clear the recital would prevail. I find in that recital these words: "and whereas it has been agreed that the said *Henry Gandy* and *Frances Orme* shall respectively enter into such covenants for the settlement of the future real and personal estate of the said *Frances Orme* as hereinafter contained." To my mind "future" can only mean one thing—the exclusion of property which was originally the wife's at the time of the settlement. With regard to the construction of the covenant, I entirely agree with the decision of the learned Judge below.

But another question was decided in the Court below, and that was with regard to the effect of the release which was given by these ladies at the time of their marriage—a release which was subsequently set aside by an order of the Court of Appeal. The learned Judge seems to have thought that the additional property —I mean the property beyond the £10,000—was property which came into existence at the date when that order was made by the Court of Appeal, and was therefore after-acquired property. I cannot concur in that view. The release never could apply to any thing but what the parties intended it to apply to. They clearly did not intend it to apply to the additional property, because they were unaware of its existence at the time of the release and at the time of the settlement. The release, therefore, to my mind, was inoperative as to this additional property. It gave no new title with regard to it, and left it in the same position in which it would have been if the release had not been executed. I think the appeal ought to be allowed.

Solicitors: *Johnston, Harrison & Powell*, for *Little & Lamonby, Penrith; J. F. Gandy; Richard Smith & Wilmer.*

F. G. A. W.

C. A.
1886
NORTH, J.
May 21.
C. A.
July 14.

LOCKE *v.* WHITE.

[1886 L. 1.]

Practice—Place of Trial—Amended Statement of Claim—Rules of Supreme Court, 1883, *Order* XXVIII., *r.* 2; *Order* XXXVI., *r.* 1.

A Plaintiff who wishes to name some place other than *Middlesex* as the place of trial must name it in the original statement of claim. If he omits to do so he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim he cannot alter it in an amended statement of claim.

THE action in this case was brought in the Chancery Division for a declaration that the Defendant was a trustee of certain sums of money alleged to have been deposited by the Plaintiff, who was a married woman, with the Defendant for safe custody and investment, for an account, and for payment by the Defendant of what might be found due to the Plaintiff.

In the statement of claim, which was delivered on the 5th of February, 1886, no place was mentioned for the trial of the action, and the Plaintiff gave no notice of any place of trial within six days under Order XXXVI., r. 1, and therefore by that rule *Middlesex* was the proper place for trial.

The Defendant delivered his statement of defence on the 6th of March, in which he denied that anything was due from him, and set up a written document by which the Plaintiff acknowledged that the Defendant was free from all liability to her.

The Plaintiff on the 5th of April delivered an amended statement of claim, in which she denied the validity of the document set up by the Defendant and claimed that it should be set aside, and named *Winchester* as the place of trial of the action.

On the 13th of April the Defendant delivered an amended statement of defence. The Plaintiff joined issue, and on the 28th of April gave notice of trial at *Winchester* at the ensuing assizes.

On the 30th of April the Defendant took out a summons before Mr. Justice *North* asking that the notice of trial might be set aside, or in the alternative that the action might be tried in the county of *Middlesex*.

The summons was adjourned into Court, and heard before Mr. Justice *North* on the 21st of May, 1886.

Everitt, Q.C., and *E. Ford,* for the Defendant.

Oswald, for the Plaintiff.

Everitt, in reply (1).

NORTH, J.:—

As to the balance of convenience, I do not see much difference between the two places. The Plaintiff has given notice of trial at *Winchester*, and the Defendant applies to have that notice set aside or discharged so that the trial may be in *Middlesex.* The only material order is Order XXXVI., rule 1. [His Lordship read the order.] Now which is the statement of claim intended? An amended statement of claim is a statement of claim, and I see nothing in the order pointing more to one than to the other, nor do I see any reason for tying the Plaintiff down to the moment of delivering his original statement of claim. The amended statement of claim is that on which the parties go to trial, and the notice should refer to it. Why should not the right to name the place of trial be left open as long as the pleadings are open? Circumstances may arise to make it necessary to change the venue after the statement of claim is delivered. A counter-claim or defence to the original statement of claim might be put in which

(1) The rules more particularly referred to in the argument were the following:—

Order XX., rule 5: "The statement of claim must in all cases in which it is proposed that the trial should be elsewhere than in *Middlesex*, shew the proposed place of trial."

Order XXVIII., rule 2: "The Plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared."

Order XXXVI., r. 1: "There shall be no local venue for the trial of any action, except where otherwise provided by statute. Every action in every Division shall, unless the Court or a Judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the defendant, or his solicitor, within six days after appearance. Where no place of trial is named, the place of trial shall, unless the Court or a Judge shall otherwise order, be the county of *Middlesex.*"

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might make a considerable difference, and might make it more convenient to have a different place of trial. I must therefore dismiss this summons.

C. M.

C. A.

From this decision the Defendant appealed. The appeal was heard on the 14th of July, 1886.

E. Clarke, Q.C., *Everitt*, Q.C., and *E. Ford*, for the Appellant:—

The Plaintiff had a right to name the place of trial on her original statement of claim or within six days afterwards under Order XXXVI., rule 1. As she did not do so the place of trial was *Middlesex*. The rule expressly provides that "where no place of trial is named, the place of trial shall, unless the Court or a Judge shall otherwise order, be the county of *Middlesex*." She had no power by amending the statement of claim, which was done under Order XXVIII., rule 2, to name another place of trial, thereby attempting to do without leave what the rules say cannot be done without the leave of the Court. The introduction of the name of a place of trial is not an amendment within that order. The name of the place of trial is no part of the statement of claim, it is to be made "on" the statement of claim, not "in" it. Under the circumstances of this case *Middlesex* is a much more convenient place for the trial than *Winchester*. The action is properly attached to the Chancery Division and there is no reason for trying it in the country: *Powell* v. *Cobb* (1).

Oswald, for the Plaintiff:—

The Plaintiff was entitled to name the place of trial in her amended statement of claim. When the claim is amended the amended claim becomes the statement of claim within the meaning of Order XXXVI., rule 1. The name of the place of trial is part of the statement of claim: it is given in the form annexed to the General Orders, App. C., sect. 1, as part of the statement of claim, not indorsed on it. If the Defendant raises a new issue of fact by his statement of defence, it is reasonable that the Plaintiff should have an opportunity of naming a new place of trial. This was done in *Cardinall* v. *Cardinall* (2) without objection. The

(1) 29 Ch. D. 486.

(2) 25 Ch. D. 772.

Defendant is too late now in attempting to set aside the amended statement as irregular, having taken a fresh step by delivering an amended statement of defence, and it must now be taken to be regular: Order XXVIII., rule 4; Order LXX., rule 2. The Judge in his discretion decided that *Winchester* was the most convenient place of trial, and this Court will not interfere with his discretion.

LINDLEY, L.J.:—

This appeal involves an important question, but I do not think that its difficulty is equal to its importance. It turns on the construction of two rules, one respecting the power of amendment of the statement of claim, and the other respecting the place of trial of the action. We have to construe them together so as to ascertain the true meaning of them. It is desirable to refer to the whole series of them. First, Order XIX., rule 2, directs that the Plaintiff shall deliver a statement of claim, and rule 5 prescribes certain forms of the statement of claim, and other pleadings which are given in the appendix to the Rules. Then Order XX., rule 5, says that the statement of claim must in all cases in which it is proposed that the trial shall be elsewhere than in *Middlesex* shew the place of trial. I think that the statement of claim in that rule means the original statement of claim. Then we come to Order XXXVI., rule 1, which says: "Every action in every Division shall, unless the Court or a Judge otherwise orders, be tried in the county or place named on the statement of claim." The first question is, does that refer to rule 5 of Order XX.? I think it does in language which is unmistakeable. Mr. *Oswald* would have us read it as if the words were "the statement of claim, whether original or amended." I do not agree with that construction, I think the statement of claim in this rule is the same as the statement of claim in Order XX., rule 5. Then Order XXXVI., rule 1, goes on to say "or (where no statement of claim has been delivered or required) by a notice in writing to be served on the Defendant, or his solicitor, within six days after appearance." This limit of time is important, because it shews that the naming of the place of trial is intended to be at an early stage of the proceedings. And there are obvious reasons why this is desirable. Then the rule goes on to say: "where no place of trial is named," *i.e.*,

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neither by the statement of claim nor by the service of a notice, "the place of trial shall, unless the Court or a Judge shall otherwise order, be the county of *Middlesex*." If we take this rule without reference to the rule as to amendment, the meaning is as plain as language can make it. When once the place of trial is fixed, there it must remain, unless there is a Judge's order to the contrary.

Now we have to consider the effect of the order as to amendment, Order XXVIII., rule 2. [His Lordship read the rule.] The language of that rule is certainly very general indeed; so general that, taking it without reference to the other rules to which I have referred, I might perhaps have thought it wide enough to include even the naming of the place of trial, but we must look at the rules together. And here we have a general rule expressed in general language, and a specific rule upon a specific subject expressed in special terms; which of them is to govern? Contrasting the general rule as to amendment with the specific rule respecting the place of trial, I think the specific rule must prevail, and that attempts like this to avoid the rule with respect to the place of trial must be discouraged. I do not think that the Judge has given sufficient effect to this specific rule, or to the consideration that where there is a general and a specific rule, the specific rule must prevail.

The form in which the application comes before us is not an application to change the place of trial, but to disregard the notice of trial as an irregular proceeding. The Appellant says that the place of trial has always been *Middlesex* and is still so, and that if the Plaintiff wants to change the venue he must apply to the Judge by summons. I think that view is correct. It is contended by the Respondent that this application is too late, under Order XXVIII., rule 4, which allows eight days only for objecting to amendments of pleadings. I think the Defendant might have applied to disallow the amendment in the statement of claim under this rule, but his omission to do so is not fatal to this appeal. For the application is not to disallow the amended claim, in which case it might be too late, but it is an application to set aside the notice of trial as not naming the place at which the trial ought to be held, and the Defendant is not precluded from making the application by any rule as to lapse of

time or by having taken a further step in the action. The consequence is that the order applied for before Mr. Justice *North* ought to be made.

LOPES, L.J.:—

I am of the same opinion. This case at first sight appeared to raise some difficulty, but when the rules are carefully looked at, it is clear. There are three rules specially bearing on the question, Order XX., rule 5, Order XXVIII., rule 2, and Order XXXVI., rule 1. Order XX., rule 5, says that the statement of claim must in all cases in which it is proposed that the trial should be elsewhere than in *Middlesex* shew the proposed place of trial. Then Order XXXVI., rule 1, says that where no place of trial is named on the statement of claim, or by notice within six days after appearance, the place of trial shall, unless the Court or Judge shall otherwise direct, be the county of *Middlesex*. I entertain no doubt that the true meaning of these two rules is, that where the place of trial has been once fixed, whether by the statement of claim or by notice, that place of trial can only be changed by order of the Court or Judge. It is impossible to read these two rules in any other way. This being so, if Mr. *Oswald's* argument is correct, the Plaintiff would be able to do that which he is precluded from doing by the rules, because he may change the place of trial without the leave of a Judge, simply by amending his statement of claim under Order XXVIII., rule 2. This point seems to me to have been lost sight of by the learned Judge who decided this case. He is reported to have said: "Why should not the right to name the place of trial be kept open as long as the pleadings are open? Circumstances may arise making it necessary to change the venue after the statement of claim is delivered." The answer to that is, that it is expressly provided by the rules that it cannot be done without the leave of a Judge. I therefore agree that this appeal must be allowed. The Defendant must have his costs both here and in the Court below.

Solicitor for Plaintiff: *A. W. Mills,* agent for *T. A. Bramsdon & Co., Portsea.*

Solicitors for Defendant: *Ashley, Tee & Sons.*

M. W.

C. A.
1886
CHITTY, J.
June 25.
C. A.
July 26.

In re IMPERIAL CONTINENTAL WATER CORPORATION.

Practice—Winding-up—Companies Act, 1862, *s.* 115 [*Revised Ed. Statutes, vol. xiv., p.* 227]—*Examination of Persons capable of giving Information—Pending Action.*

An order having been made for winding up a company, *P.*, who held a mortgage on calls, and who was also a holder of shares, brought his action against the company and the directors, claiming to have his mortgage of calls enforced, and any deficiency made good by the directors, and also to have an agreement enforced, one term of which was that his shares should be cancelled, and to have his name removed from the register and from the list of contributories. Before issue was joined in this action, *P.*, as an alleged contributory, obtained an order under sect. 115 of the *Companies Act*, 1862, for the examination of the directors. The directors moved to have their examination under this order postponed till after the trial of the action, and Mr. Justice *Chitty* made an order accordingly :—

Held, on appeal, that this postponement was right, for that the powers of sect. 115 were given for the more beneficial winding-up of the company, and ought not to be used for the purpose of giving to the plaintiff in an action brought to enforce his own individual rights, and which could not be for the benefit of the company, means of discovery beyond those which the law gives to a plaintiff.

THE company was registered in July, 1879. In November, 1881, *W. H. Punchard* held 1501 shares in the company and 4583 more were held by nominees of his on his behalf. On the 15th of November, 1881, an indenture between the company and *Punchard* was executed, by which the company assigned to *Punchard* by way of mortgage, one moiety of a call already made on the shares in the company, and of all calls that should be made, to secure to *Punchard* the payment with interest of the sum of £2200 advanced by him to the company, and of all other sums which he might advance to the company. On the following day a written agreement was entered into between the company and *Punchard*, by which *Punchard* agreed to purchase at the prices therein mentioned all the ordinary and preference shares except those held by certain pipe contractors and the directors, and it was agreed that the shares then held by him and his nominees should be cancelled.

On the 6th of December, 1884, an order was made for winding up the company. On the 7th of November, 1885, *Punchard*, with the leave of the Court, commenced an action (1885. P. 2767) against the company and the directors, stating various acts done by himself in performance of the agreement, and stating that the company had refused to accept a surrender of or to cancel the shares held by the Plaintiff and his nominees, and had refused to carry out the provisions of the indenture of the 15th of November, 1881, in the Plaintiff's favour, and that he had been admitted as a creditor for £3791 7*s.* 5*d.* in the winding-up. He claimed specific performance of the indenture of the 15th of November, 1881, and to have calls made for enforcing his security, and to have the directors declared personally liable for the deficiency. He also claimed specific performance of the agreement of the 16th of November, 1881, and a declaration that he was entitled to have his name and the names of his nominees removed from the register of members and from the list of contributories, or in the alternative damages against the directors for breach of their undertaking to carry out the agreement, and for misrepresenting their powers and authority to enter into the agreement. A defence was put in, but issue had not yet been joined.

On the 4th of March, 1886, *Punchard* as a contributory took out a summons in the winding-up for an order giving him liberty to summon under the direction of the Judge any person or persons, and in particular the seven persons therein named (being the directors who were parties to the action, the secretary and two other persons therein named), for examination before an Examiner of the Court. On the 11th of March, 1886, an order was made in Chambers (the matter not being brought before the Judge personally) that the ten persons named in the summons should attend before one of the Examiners to be examined under sect. 165 of the Act, and the applicant was authorized to conduct the examination.

Six of the above directors on the 1st of June, 1886, gave notice of motion that the examination under the above order might be postponed until after the trial of the action.

The motion was heard before Mr. Justice *Chitty* on the 25th of June, 1886.

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H. Burton Buckley, in support of the motion:—

It was never intended by sect. 115 of the *Companies Act*, 1862, that this power of summoning persons for examination should be given to the Plaintiff for the purpose of obtaining information to be used by him in the prosecution of an action against the directors and the company, and not in any way for the purposes of the winding-up or for the benefit of the company. In this case the order was obtained by a suppression of material facts. All that is said in reply to the statement that the application was made solely for the purpose of obtaining information for the use of Mr. *Punchard* is, that such application was not made solely for that purpose.

Seward Brice, for *Punchard*:—

The mere fact that part of the information which may be obtained from the directors (who, as directors, are bound to give information which is wanted for the purpose of winding up the company), bears upon the action, is not sufficient to induce the Court to say that the examination shall not proceed. The motion, though in form a motion to stay proceedings under the order, is practically an appeal from the order by persons summoned to be examined under it, which will not be allowed: *In re Gold Company* (1).

J. T. Prior, for the Liquidator, took no part in the argument.

CHITTY, J.:—

Sect. 115, as is well known, confers extraordinary powers upon the Court for the purpose of obtaining information as to the estate and effects of the company, and under that section the Court has the very stringent power of summoning persons before it who may be deemed capable of giving information. Those extensive powers are conferred upon the Court for the beneficial winding-up of the company, for sometimes it happens that the liquidator is unable to obtain from unwilling persons the information which he requires. The usual course is for the liquidator, when a proper case arises, to apply to the Judge in Chambers

(1) 12 Ch. D. 77.

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for an order under sect. 115, but it cannot be disputed that when the liquidator does not himself make the application, some other person, a contributory or alleged contributory, may make the application. Accordingly Mr. *Punchard* (the liquidator in this case not thinking it right to apply) makes the application, and the liquidator required him, and I think rightly, to make an affidavit shewing the grounds upon which he asked the Judge in Chambers to interfere; the usual course being that in the case of the liquidator, who is the Court's own officer, his statement is accepted. Mr. *Punchard* made an affidavit in which he did not disclose to the Judge in Chambers the existence of this action, except by a statement (par. 12 of his affidavit) that an action was then pending in reference, amongst other things, to one particular part of those matters on which he sought to obtain information by examination. And the affidavit which, as of course as against him, ought, I consider, to contain the whole of the case on which he relied, did not contain, as it ought to have done, the statement that some of the persons whom he proposed to examine under the order were Defendants in the action. I think that Mr. *Punchard* was guilty of suppression, and it was most improper to obtain this order, which is always obtained *ex parte*, because I need scarcely say that the parties to be examined are never served with notice of motion. The proceeding being necessarily made in the absence of the party intended to be examined, it is a proceeding which, as a general rule, requires that there should be a full disclosure of the circumstances, and particularly of those circumstances which are adverse to the party making the application. I think there was an abuse of the process of the Court, and an improper suppression of facts. If the facts had been known to the Chief Clerk, I am satisfied that he would not have made the order, and that the matter would have been brought before me, when I could have dealt with it according to my discretion. The liquidator is right, that the topics on which Mr. *Punchard* proposes to examine the witnesses under the order which he has obtained are substantially the same as the matters which are in issue in the action. Whether here and there one may exceed or fall short of the other is to my mind quite immaterial, for in substance the same

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questions are mooted and involved in both proceedings. A strong point disclosed in the affidavits against Mr. *Punchard* is the statement, which he has to meet, that he intends to use the order not in any way for the purpose of the winding-up, or for the benefit of the company or the estate, but solely for the purpose of obtaining for himself information to be used by him in the prosecution of his action against the company and against the directors. That is denied, but the denial is simply a denial in the very terms. All he can say is, that he does not intend to use it solely for the purposes of his action. That amounts to an admission that it will be used in a large degree for that purpose. That of course is most improper. Sect. 115, which confers these very extraordinary powers, and which puts persons very often to considerable inconvenience, was never intended to be used for the purpose of assisting another litigant party in an action. All the discovery which Mr. *Punchard* is entitled to obtain from the Defendants is such discovery as he can obtain in the action itself. Sect. 115 was never intended to aid a litigant in getting information by means of an examination under the order. The case does not quite stand there, for the same affidavit of Mr. *Webster* (the applicant's solicitor) goes on to state his information and belief that "upon an application for further time made by *Punchard* in the action, it was stated by his solicitor that he was unable to deliver his defence to the counter-claim of the liquidator of the corporation, until he had examined the directors under the said order." There is not only no denial of that which is stated on belief as to the intention of Mr. *Punchard*, and the object for which he intended to use the order, but there is a direct allegation of a statement by him that he was actually intending to avail himself of the order for the purpose of the action. It does not matter that the reply has been delivered, for there is a direct admission by Mr. *Punchard* that he intends using the order illegitimately. I think that the applicants are entitled to a stay of proceedings under the order until after the action is disposed of, and I part with the motion by saying that there has been great misconduct on the part of Mr. *Punchard* in obtaining this order, seeing that he intends making an improper use of it.

F. G. A. W.

Punchard appealed. The appeal was heard on the 26th of July, 1886.

Ince, Q.C., and *Seward Brice*, for the appeal:—

The Plaintiff does not lose his right as a contributory because he is Plaintiff in an action, and he is entitled to proceed under the order which he has obtained. The Judge to whose Court the winding-up is attached decided that the case was one where an examination ought to be ordered, and the taking it ought not to be postponed. This is in fact an appeal against that order in an indirect way. A person summoned under sect. 115 has no *locus standi* to appeal against the order for examining him: *In re Gold Company* (1). The Plaintiff can only enforce an answer to questions which are germane to the matters on which an examination can be directed under sect. 115; and the witness is not in the position of an ordinary witness, but is entitled to the assistance of counsel to protect him from answering questions which he is not bound to answer. The examination therefore cannot be used for improper purposes and ought to be allowed to proceed.

H. Burton Buckley, for the directors.

J. T. Prior, for the liquidator.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Chitty* that the examination of the directors, under an order made for their examination, should not be proceeded with till after the trial of an action brought against them by the Appellant. I think he was right.

The order for examination was made under sect. 115 of the *Companies Act*, 1862. Now in the first place that section gives no right at all to a liquidator, creditor, or contributory, but it gives power to the Court, if in its discretion it thinks it right so to do, to order any person capable of giving information concerning the trade, dealings, estate, or effects of the company to be summoned before it for the purpose of being examined. This

(1) 12 Ch. D. 77, 82.

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leaves it to the discretion of the Judge to say whether, under any particular circumstances, the Court will, at the instance of the person who applies, make an order under this power. *Primâ facie* the powers of this section are to be exercised for the purposes of the winding-up and for the benefit of those who are interested in the winding-up. Now what has taken place here is this: The Appellant has brought an action against the corporation and the directors for the individual benefit of himself and other persons whom he alleges to be entitled to have their names taken off the list of shareholders. I cannot see that this examination which it is desired to press on can in any way be beneficial to him until after the trial of the action except for the purposes of the action. He has said he is a contributory and he wants to know what assets there are to be distributed. He must curb and restrain his inquisitiveness for a time, for it is no great loss to him to have it postponed for a time.

Then it is said he has had a call made against him. It is not suggested that he is going to move to discharge it, and he will have to pay it notwithstanding what he may get by this examination. What the case comes to is this: he desires, for some purposes connected with his action, to have this examination taken. Now, in my opinion, that is not the proper object of this section, and I think the Judge was quite right in declining, pending that action, to exercise the powers of this section against the Defendants so as to give the Plaintiff, who has the ordinary means of discovery, which the law allows him, this additional mode of discovery, simply because the company is being wound up. In my opinion it would have been wrong to allow the Plaintiff in such an action as this to have the benefit of the powers of this section for the purposes of that action. I do not say that this would be so in all cases, for instance, where the liquidator suggests, or the contributory shews by affidavit, that there is reasonable ground for suspecting that the directors have put into their own pockets moneys which ought to go into the coffers of the company, it would in my opinion be no answer to an application under this section that an action is pending. The examination would in that case be carried on for the purposes of the winding-up, for the action would be an action for the benefit

of all creditors and contributories of the company. Here the object of the action is solely to get some benefit for Mr. *Punchard*, who is seeking to enforce his own individual rights as against the company and its directors. I think the Judge was quite right even if, when the order of the 11th of March was made, the Chief Clerk was informed of the nature of this action. I hardly think that he can have been fully informed of it, but I do not put my judgment in any way on the suppression of facts before him. I think that, if all the facts were known to the Judge in Chambers or his officer when he made that order, the order now under appeal would still be right. Pending the action Mr. *Punchard* may exercise his right to discovery in the ordinary way, but the powers given by sect. 115 ought not in my opinion to be resorted to on his application.

LINDLEY, L.J.:—

I am of the same opinion. This section is one of a group with which we are all familiar, sects. 100, 115, 165, and 168, which authorize proceedings against directors. The object of them all is to enable the company, through its liquidator, with a view to the benefit of the creditors or contributories, or both of them, to ascertain what has been going on, and what has been done with the assets of the company. It cannot be said as a general proposition that the power given to the Court by sect. 115 can never be exercised while there is a pending action between some contributory and the directors. One must look at the object of the action, and look at the object of the section which gives these powers, and having regard to the object of the section it is not in my opinion to be applied to an action brought by Mr. *Punchard* for his own individual benefit apart from that of the contributories generally. To help such an action is not the object of this section. An action might in substance be an action by a contributory for the benefit of himself and the other contributories, having for its object the getting in the assets of the company. That would be a totally different action, and the Judge would probably in such a case take a different view of the propriety of making an order under this section. When looking to the object of this action it seems to me, that it would be an

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abuse of this power and not a use of it, if Mr. *Punchard's* application were granted.

I think the view taken by the learned Judge was quite right and the appeal must be dismissed.

Lopes, L.J. :—

The 115th section of the *Companies Act*, 1862, gives large and extensive powers to the Court in respect of certain matters, but those powers, as I understand it, are given with a view to the more beneficial winding-up of the company. The exercise of those powers is within the discretion of the Judge below, who knows more than we of the affairs of the company being wound up, and has the control of the winding-up of the company. It is a discretion which I think ought not to be interfered with except in extreme cases. In the case before us the learned Judge has postponed the examination of these directors. Here a contributory has brought an action against the company and the directors. The learned Judge seems to have acted upon the view, that this application under the 115th section is not made for the purposes of advancing the winding-up of the company or of obtaining information beneficial to the winding-up of the company, but rather to advance the case of the contributory in the action which he is bringing against the company, and on that ground he has postponed the examination, and, I think, quite rightly.

Solicitors for *Punchard*: *Blake, Snow, & Nephew.*
Solicitors for directors: *Baker, Webster, & Battcock.*
Solicitors for liquidator: *Norton, Rose, & Co.*

H. C. J.

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[1886 E. 252.]

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CHITTY, J.
June 5, 7.
C. A.
July 26, 28.

Action for Recovery of Land—Discovery—Title Deeds—Purchaser for Value without Notice—Privilege—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 2 [*Revised Ed. Statutes, vol. xvii., p.* 75].

An action of ejectment was brought in the Chancery Division by a devisee to recover possession of land. The Defendants, by their statement of defence, pleaded (1) possession; (2) purchase for value without notice. By their affidavit of documents they objected to production of certain documents on the ground that they were purchasers for value without notice, and as to some of them on the further ground that they did not prove or tend to prove the case or title of the Plaintiffs. The Plaintiffs applied for production:—

Held, by *Chitty*, J., that under the *Judicature Act*, 1873, sect. 24, sub-sect. 2, the Defendants stood in the same position as they would have been in if a bill of discovery had under the old practice been filed against them, and that production ought not to be ordered.

Held, on appeal, that the case was not analogous to that of a bill for discovery met by a plea of purchase for value without notice—that the action was one for relief, and as the Defendants by pleading possession had put the Plaintiff to proof of her title she had the ordinary right of a plaintiff to discovery of matters tending to support her title, and that the Defendants could not resist production on the ground that they were purchasers for value without notice:

But, *held*, that those documents which were sworn not to prove or tend to prove the Plaintiff's case were sufficiently protected, though the affidavit did not go on to say that they did not contain anything to impeach the title of the Defendants.

THE Plaintiff by her statement of claim alleged to the effect that *Zephaniah Emmerson*, by his will, left the freehold property in question in this action to his son, *John Emmerson*, for life, with a proviso of forfeiture on alienation, and after his death to his children in fee. That the testator died in 1862. That *John Emmerson* took possession, and died in 1882, and that the Plaintiff was his only child. That *John Emmerson* had wrongfully sold the premises to the Defendants, *Ind, Coope & Co.*, who were now in possession, and who also had possession of the deeds and documents of title relating to the premises shewing the title of *Z. Emmerson* and the dealings of *John Emmerson* with the property, and that these deeds and documents were necessary to

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establish the Plaintiff's title to the property. The Plaintiff claimed (1) possession of the property; (2) production and delivery of the deeds and documents; (3) declaration that *John Emmerson's* title ceased on alienation; (4) mesne profits from the date of alienation or from the death of *John Emmerson*; (5) a receiver.

The Defendants on the 29th of March, 1886, put in the following defence:—"(1.) The Defendants are in possession of the premises by themselves or their tenants. (2.) The Defendants, *Ind, Coope & Co.*, became the purchasers for valuable consideration without notice of part of the premises and title deeds and documents from one *John Emmerson* under two several indentures dated respectively the 25th of January, 1870, and the 30th of March, 1876, and of the remaining part thereof from *W. P. Brown* and *E. Brown* under an indenture dated the 10th of May, 1880, the purchase-money paid by the Defendants under such indentures being respectively £250, £100, and £105. The Defendant *Wrenn* claims under the Defendants *Ind, Coope & Co.*, as their tenant."

On the 5th of April the common order was made for the Defendants to file an affidavit as to documents in their possession "relating to the matters in question in this action," the affidavit on behalf of *Ind, Coope & Co.* to be made by *Matthews*, one of the partners.

Matthews filed an affidavit admitting the possession of documents relating to the matters in question in the action, and set forth in three schedules, and stating that he and his partners objected to produce the documents in the second schedule on the following grounds:—

(1.) As to the documents numbered 1 to 4, both inclusive, "that such documents are all of them documents of title of the Defendants, Messrs. *Ind, Coope & Co.*, of property the subject of this action, and that none of such documents prove or tend to prove the case or title of the Plaintiff, and further, as to such documents that the said Defendants are purchasers for valuable consideration without notice thereof."

(2.) As to the documents numbered from 5 to 16, both inclusive, "that such documents are all of them documents of title of

the Defendants Messrs. *Ind, Coope & Co.*, of property the subject of this action, and that the said Defendants are purchasers for valuable consideration without notice thereof."

The Plaintiff took out a summons asking that notwithstanding the objections raised by the affidavit the Defendants might be ordered to produce the documents. This summons was adjourned into Court, and came on for hearing before Mr. Justice *Chitty* on the 5th of June, 1886.

Whitehorne, Q.C., and *E. Ford*, in support of the summons:—

The defence of purchaser for value without notice does not apply and cannot be sustained, as this is not a suit in aid of an action at law, but it is the action itself.

Under the *Judicature Act* either Division of the High Court has power to administer both Equity and Common Law, and by sect. 24, sub-sect. 7 of the Act of 1873 can give complete relief.

[They referred to *Phillips* v. *Phillips* (1); *Joyce* v. *De Moleyns* (2); *Jones* v. *Monte Video Gas Company* (3); *Lyell* v. *Kennedy* (4); *New British Mutual Investment Company* v. *Peed* (5); *Combe* v. *Corporation of London* (6); *Compagnie Financière du Pacifique* v. *Peruvian Guano Company* (7); *Duchess of Newcastle* v. *Lord Pelham* (8); *Williams* v. *Lambe* (9); *Manners* v. *Mew* (10); *Bray's* Law of Discovery (11).]

Haldane, for the Defendants, referred to *Bassett* v. *Nosworthy* (12); *Wallwyn* v. *Lee* (13); *Gomm* v. *Parrott* (14); *Roberts* v. *Oppenheim* (15); *Minet* v. *Morgan* (16); *Attorney-General* v. *Emerson* (17); *Kearsley* v. *Philips* (18); *Heath* v. *Crealock* (19).

Whitehorne, in reply.

(1) 4 D. F. & J. 208.
(2) 2 J. & Lat. 374.
(3) 5 Q. B. D. 556.
(4) 8 App. Cas. 217.
(5) 3 C. P. D. 196.
(6) 1 Y. & C. Ch. 631.
(7) 11 Q. B. D. 55.
(8) 3 Bro. P. C. 460.
(9) 3 Bro. C. C. 264.
(10) 29 Ch. D. 725.
(11) Pages 276, 539, 541.
(12) Finch, 102.
(13) 9 Ves. 24.
(14) 3 C. B. (N.S.) 47.
(15) 26 Ch. D. 724.
(16) Law Rep. 8 Ch. 361.
(17) 10 Q. B. D. 191.
(18) 10 Q. B. D. 36, 465.
(19) Law Rep. 10 Ch. 22.

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CHITTY, J. :—

In their affidavit of documents the Defendants claim privilege for certain of the title deeds and documents on the ground that they were purchasers for valuable consideration without notice.

This action is for the recovery of land and the discovery of title deeds. Apart from the *Judicature Acts* the action is divisible into two parts,—one for the recovery of the land, and the other for discovery. The latter of the two would before the *Judicature Act* have been commenced in the Court of Chancery by a bill of discovery, and the Plaintiff would then have been met by the plea of purchase for value without notice, and would have failed, because the Court would not give discovery against a purchaser for valuable consideration without notice. A purchaser for value occupied such a position that the Court would not interfere against him, but it would not give him any assistance—it stood neutral. There was, however, a special exception to this rule in cases where the Court of Equity exercised a concurrent jurisdiction with the Courts of Common Law, referred to by Lord *Westbury* in *Phillips* v. *Phillips* (1), where he says (2), "There appear to be three cases in which the use of this defence is most familiar. First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett* v. *Nosworthy* (3)), or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn* v. *Lee* (4)), and the defendant pleads that he is a *bonâ fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law. Thus it was decided by Lord *Thurlow* in *Williams* v. *Lambe* (5), that the defence could not be pleaded to a bill for dower, and by Sir *John Leach* in *Collins* v. *Archer* (6), that it was no answer to a bill for tithes. In those cases the Court of

(1) 4 D. F. & J. 208.
(2) Ibid. 216.
(3) Finch, 102.
(4) 9 Ves. 24.
(5) 3 Bro. C. C. 264.
(6) 1 Russ. & My. 284.

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Equity was not asked to give the plaintiff any equitable as distinguished from legal relief." In these cases, then, the Court did in giving the discovery asked reject the plea of purchaser for valuable consideration without notice.

I will now examine the *Judicature Act*—it has not fused the two systems of Equity and Common Law; the Court administers both systems, and, except so far as they have been altered by the Act, they remain distinct. It is enough for the present purpose to consider sect. 24 of the Act of 1873, which enacts that "In every civil cause or matter commenced in the High Court of Justice Law and Equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following." The important rule is that contained in sub-sect. 2, and I will only read the words bearing on the case before me: "If any defendant claims to be entitled . . . to relief upon any equitable ground . . . against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff." In this case the Defendants do allege a ground of equitable defence to the Plaintiff's claim for discovery. Then sub-sect. 2 proceeds as follows: "the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act."

The result of this enactment is to put the Defendants in the same position as they would have been in if a bill of discovery had under the old practice been filed against them.

Though there is only one action there are in reality two distinct proceedings, and the old rule must prevail, and this summons must be dismissed.

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The Plaintiff appealed, and the appeal was heard on the 26th and 28th of July, 1886.

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EMMERSON v. IND, COOPE & CO.

Whitehorne, Q.C., and *E. Ford*, for the Appellant:—

There is no universal rule that a Court of Equity will not assist a plaintiff against a purchaser for value without notice: *Phillips* v. *Phillips* (1). In *Lyell* v. *Kennedy* (2) Lord *Selborne* says (3): "It was admitted by the learned counsel for the respondent that discovery in aid of an ejectment at law might always be obtained by a bill praying relief, even if the relief were only to prevent the setting up of outstanding terms." Here we have an action seeking relief, and according to that rule discovery may be obtained. In a suit for relief the defence of purchase for value without notice has never been held a bar to discovery unless it was raised by plea. Moreover, a plea of purchase for value without notice is no bar to discovery where the Plaintiff has a legal title: *Williams* v. *Lambe* (4); *Collins* v. *Archer* (5). The Court below relied on sect. 24, sub-sect. 2, of the *Judicature Act*, 1873, but the present is a case where the Court would under the old practice have given discovery, as the action is for relief and not for discovery only. None of the deeds are protected, for the Defendants must set out all that relates to the Plaintiff's title: *Compagnie Financière du Pacifique* v. *Peruvian Guano Company* (6); *Duchess of Newcastle* v. *Lord Pelham* (7), and the Defendants do not say that the documents contain nothing which tends to impeach the Defendants' title.

Haldane, for the Respondents, was called on only in regard to those documents as to which it was sworn that they were in the possession of the Respondents as purchasers for valuable consideration without notice, but not that they did not relate to the Plaintiff's title:—

The *Judicature Acts* have not affected the principles upon which discovery is to be granted: *Kearsley* v. *Philips* (8); *Lyell* v. *Kennedy*. Sect. 24, sub-sect. 2, of the *Judicature Act*, 1873, enables us to set up the objection of purchaser for valuable consideration without notice as an equitable defence to this

(1) 4 D. F. & J. 208, 217.
(2) 8 App. Cas. 217.
(3) Ibid. 226.
(4) 3 Bro. C. C. 264, and *Belt's* note.
(5) 1 Russ. & My. 284.
(6) 11 Q. B. D. 55.
(7) 3 Bro. P. C. 460.
(8) 10 Q. B. D. 465.

claim as fully as we could have done before that Act. Even assuming it to be true that under the old Chancery practice this point could have been successfully taken only by way of plea, and that that plea to be good must have stood alone, that was a mere rule of practice, which no longer exists. The principle was one of substance, that as against such a purchaser a Court of Equity, in the exercise of its auxiliary as distinguished from its concurrent jurisdiction, would not stir a step: *Wallwyn* v. *Lee* (1); *Heath* v. *Crealock* (2). *Gomm* v. *Parrott* (3), although it may be excepted to on the ground that the jurisdiction there was really concurrent, shews that under the analogous system of discovery established by the *Common Law Procedure Act* this objection would have been fatal to the Plaintiff's attempt. This case must be determined upon the affidavit of documents, where the objection is raised by itself as distinguished from the pleadings, treating the Plaintiff's summons for production as on the footing of a bill of discovery. The only reason why it is stated as a defence in the pleadings is because leave was obtained by the Plaintiff to join a claim for production of documents with her claim for possession of the land.

COTTON, L.J.:—

The question in this case is, whether the Defendants can successfully resist an application for production of documents. The Plaintiff claims the estate in question under a devise, the Defendants claim as purchasers from the heir-at-law, and they allege by their statement of defence that they are in possession, and that they acquired the property as purchasers for value without notice. On this latter ground they resist production, and as to some of the documents on the further ground that they do not tend to prove the Plaintiff's title. I think that as to these latter documents the Defendants have sufficiently protected themselves. They have not indeed deposed that these documents do not contain anything to impeach the Defendants' title, but in my opinion it was not necessary that they should say so, for a plaintiff must recover by the strength of his own

(1) 9 Ves. 24. (2) Law Rep. 10 Ch. 22.
(3) 3 C. B. (N.S.) 47.

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title, and is not entitled to discovery for the sole purpose of shewing that the defendant has not a title. It was urged that in *Compagnie Financière du Pacifique* v. *Peruvian Guano Company* (1), it is said that everything which relates to the matters in question should be in the affidavit. In that case, however, the question was not as to production, but as to what must be included in the affidavit, so that decision is not opposed to the view we take.

The other is the more important question. It is urged for the Defendants that a purchase for value without notice was a good defence to a bill in equity for discovery, and therefore ought to protect the Defendants against production of documents. If the defendant to a bill for discovery or relief had put in a plea of a purchase for valuable consideration, the issue would have been confined to that one point, and the plaintiff would not have been entitled to discovery of anything except what might enable him to disprove the plea. But here the Defendants put in two defences: they plead possession, by which they put the Plaintiff to proof of her title, and they also allege a purchase for value. It would be wrong in principle to allow a defence, which might be a good protection against discovery if it stood alone, to be a protection when combined with another defence. The Defendants having put the Plaintiff to proof of her title, on what ground can they refuse discovery of what tends to establish that title? It was urged that the matter must be dealt with on the affidavit as if it had been put in before the defence, and that it raises no question as to the Plaintiff's title. But if it had been put in before the defence, I think the proper course would have been for the Judge to ask whether the Defendants had any other ground of defence to the action, and unless it was distinctly stated that they had not, then to postpone the application until the statement of defence had been put in, and then if a double defence was stated the Defendants would not be protected from discovery. We need not enter into the question whether if this had been a bill for discovery in aid of an action at law the Defendants would have been protected from discovery. This proceeding is not analogous to the old bill of discovery. The

(1) 11 Q. B. D. 55.

Legislature has now given the Chancery Division power to deal with actions of ejectment, and the plaintiff bringing such an action in that Division has the ordinary rights of a plaintiff as to discovery.

LINDLEY, L.J.:—

Mr. *Haldane's* argument appears to me to go upon a false analogy. He asks us to treat this action, which is one for relief and discovery, as a bill for discovery only, which is met by a plea of purchase for value without notice. That is not the nature of these pleadings. Mr. Justice *Chitty* has fallen into an error, which appears traceable to this, that he forgot the difference between the case of a bill for discovery met by a plea and the case of a bill for relief and discovery met by an answer denying the Plaintiff's title. As regards the documents as to which it is sworn that they do not prove or tend to prove the Plaintiff's case, I agree that they are sufficiently protected.

LOPES, L.J.:—

This is not a bill for discovery but an action of ejectment in which two defences are set up—possession, and purchase for value without notice. It is argued that this latter defence protects the Defendants from giving discovery. It is easy to see why a plea of purchase for value without notice should be a defence to a bill for discovery, because on such pleadings nothing would be in issue but the fact of purchase for value without notice—the Plaintiff's title would be admitted, and he could not have any right to discovery except for the purpose of disproving the plea. Here the plea of possession puts the Plaintiff to proof of her title *in omnibus*, and the Defendants are not entitled to the same privileges as in a proceeding where they admit the Plaintiff's title. In one case discovery is not wanted, in the other it is essential. If we were to dismiss this appeal I think it would lead to great injustice.

Solicitor for Plaintiff: *J. W. Sykes.*
Solicitors for Defendants: *Haynes & Clifton.*

H. C. J.

C. A.
1886
July 27, 28.

In re CHRISTMAS.
MARTIN *v.* LACON.

[1881 C. 2260.]

Charity—Mortmain—Assignment of Harbour Duties—Interest in Land—9 Geo. 2, c. 36 [Revised Ed. Statutes, vol. ii., p. 403].

A bond by Harbour Commissioners in the form prescribed by their Act assigning the duties which they were empowered to levy on ships entering and leaving the haven, or loading or unloading in the roads, and which were to be applied: 1, in payment of the expenses of obtaining the Act; 2, in payment of the interest of moneys advanced for defraying such expenses; 3, in payment of the interest of moneys borrowed under the Act; 4, in defraying working expenses; and, 5, in payment of principal moneys borrowed under the Act, is not an interest in or affecting land within the *Mortmain Act* (9 Geo. 2, c. 36), and may be given by will for charitable purposes.

Knapp v. *Williams* (1) questioned.
Ion v. *Ashton* (2) not followed.
Attorney-General v. *Jones* (3) distinguished.
The decision of *Chitty*, J., reversed.

THIS was an appeal from a decision of Mr. Justice *Chitty* (4).

The question for the consideration of the Court was whether a bond for £400, granted under their Act by the *Great Yarmouth* Port and Haven Commissioners, of which the testator was possessed at the time of his death in February, 1881, was or not pure personalty, and as such applicable for the charitable purposes declared in the testator's will dated the 7th May, 1880.

The *Great Yarmouth Port and Haven Act*, 1835 (5 & 6 Will. 4, c. xlix.), by sect. 4 enacted that the property belonging to the Commissioners under the former Acts, which were repealed, including the *Haven House* and all warehouses, workshops, and other buildings, and the piers, jetties, breakwaters, sluices, docks, and other works should be vested in the Commissioners for the time being for the purposes of the Act.

Sect. 29 provided that there should be a committee of survey to survey the *Haven, Great Yarmouth*, every three years and the several rivers emptying themselves therein, and the impediments

(1) 4 Ves. 430, n.
(2) 28 Beav. 379.
(3) 1 Mac. & G. 574.
(4) 30 Ch. D. 544.

and annoyances found therein, and the usual wharfs and quays within the same, and report the same to the Commissioners, and the Commissioners might pay and allow out of the moneys to be received by them under the authority of this Act the reasonable expenses of the said committee in and attending their surveys of the property.

Sect. 35 provided that the Commissioners should support, repair, and maintain the haven, the present piers and jetties, and erect, repair, and maintain all such other piers and jetties, and all such basins, locks, beacons, lights, and other works as they should think expedient for the improvement of the haven, and for rendering the same safe and commodious, and should erect and maintain certain other works connected with the rivers running into the haven as therein mentioned.

Sect. 42 gave power to the Commissioners to levy certain duties on all vessels, according to their tonnage, entering or leaving the haven (with certain exceptions) and on all vessels loading or unloading in *Yarmouth Roads*; and also certain duties on goods imported and exported in all such vessels.

Sect. 82 enacted that all moneys raised and collected under the Act should be paid to the treasurer, who should not disburse any money without an order in writing from the Commissioners.

Sect. 85 provided that it should be lawful for the Commissioners from time to time to borrow any sum or sums of money not exceeding in the whole at any one time £20,000 upon the credit of the duties by the said Act granted; and the Commissioners were thereby empowered to mortgage, assign, and charge all or any part of the said duties by the said Act granted (the costs and charges of assigning the same to be paid out of such duties) as a security for any such money to be borrowed as aforesaid, with interest, to and for the benefit of the party who should advance the same or his trustee; and all such mortgages, assignments, and charges should be according to the form therein set forth (or with such variations therein as the circumstances of the case might render necessary). By these bonds the Commissioners under their hands and seals, in consideration of the sum of £ —— advanced and lent by *A. B.*, were expressed to assign unto the said *A. B.*, his executors, administrators, and assigns, "such pro-

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portion of the duties arising by virtue of the said Act as the said sum of £—— doth or shall bear to the whole sum which hath or shall have been or may at any time be borrowed and become due and owing or be charged upon the credit of the said duties, to hold the same unto the said *A. B.* until the said sum of £——, together with interest after the rate of —— per cent. per annum for the same, shall be repaid and satisfied."

Sect. 86 provided that no preference should be given to any person or to any assignee of any person advancing money under the authority of the Act by reason of priority of date of any mortgage or assignment or other security for the same, but that such persons respectively and their respective assigns should be respectively entitled to their respective quotas of the said duties in proportion to the accrued amount of the interest of the moneys borrowed on mortgage.

Sect. 93 enacted that every year the Commissioners should, out of the duties payable under the Act, pay to the corporation of the city of *Norwich*, and to the justices of the county of *Norfolk*, and to the justices of the county of *Suffolk* respectively, the estimated cost of cleansing and deepening the respective rivers *Yare*, *Bure*, and *Waveney*.

Sect. 97 provided that all the duties by the Act granted to the Commissioners, and all other sums of money which at the time of the passing of the Act should be in hand from the receipt of duties under the repealed Acts, and all other sums of money to be received from time to time by the Commissioners for executing the present Act, should be vested in the said Commissioners, and should be applied by them and disposed of—(1) in paying the costs, charges, and expenses incurred in applying for and obtaining the present Act, and otherwise relating thereto; (2) in paying the interest of any money which should have been advanced for defraying such costs, charges, and expenses; (3) in paying the interest of any money borrowed and then due under the repealed Acts, or which might be borrowed under the authority of the present Act, as and when the same should become due; (4) in defraying the expenses attending the execution of the several works, matters, and things by the said Act authorized, and in paying the moneys thereby made payable to the city of

Norwich and the counties of *Norfolk* and *Suffolk* respectively; and (5) in paying any principal or other moneys and demands borrowed, incurred, and then due under the authority of the repealed Acts, or which might be borrowed under the authority or on the credit of the present Act.

Mr. Justice *Chitty* held that the bonds of the Commissioners were an interest in and affecting land within the meaning of the *Mortmain Act*, 9 Geo. 2, c. 36, and could not be given by will for charitable purposes: and from this decision the Attorney-General appealed.

Ingle Joyce (Sir *C. Russell*, A.G., Sir *H. Davey*, S.G., and *Reginald Smith*, with him), for the Crown:—

The bond granted by the Harbour Commissioners is simply an assignment of the net income from duties arising by virtue of the Act, which are enumerated in sect. 42, and does not constitute any charge on land within the 9 Geo. 2, c. 36. It is subject to payments which are a primary charge on the duties, and if a receiver were appointed on behalf of the bondholders, he could only take possession of the net income after these payments had been made. It is similar to a debenture of a railway company, where the charge is on the undertaking, which has always been held not to be within the *Mortmain Act*. *Knapp* v. *Williams* (1), which is mainly relied on by the other side, is not conclusive in their favour, for it appears that the toll-houses were included in the security, as is stated by the Lord Chancellor in *Myers* v. *Perigal* (2). It is settled by all the modern authorities that in order to create an interest in land, the land must be affected directly. In the present case the land and buildings belonging to the commissioners are not included in the security, nor are the duties in any way connected with the land. They are levied on ships entering and leaving the haven, and on those which only lie in the roads without touching the land: *Attree* v. *Hawe* (3); *Walker* v. *Milne* (4); *Thornton* v. *Kempson* (5); *In re Harris* (6); *Jervis* v. *Lawrence* (7).

(1) 4 Ves. 430, n.
(2) 2 D. M. & G. 599.
(3) 9 Ch. D. 337.
(4) 11 Beav. 507.
(5) Kay, 592.
(6) 15 Ch. D. 561.
(7) 22 Ch. D. 202.

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W. Baker, and *J. Trustram*, for the Plaintiffs, the next of kin:—

It is true that the buildings vested in the Commissioners are not included in the security of the bond; but the duties payable by the ships are connected with the land. They are for the purpose of keeping up the harbour and the buildings, and are paid in respect of the enjoyment of the harbour. The right to collect them is a franchise connected with land, and is an incorporeal hereditament. The right to take tolls in a market is such a hereditament, although the land on which the market is held may not be vested in the owner of the tolls. *Knapp* v. *Williams* (1), which decided that turnpike tolls are within the *Statute of Mortmain*, has never been overruled, and has been followed in other cases: *Finch* v. *Squire* (2); *Ion* v. *Ashton* (3); *Alexander* v. *Brame* (4); *Chandler* v. *Howell* (5); *In re Mitchell's Estate* (6); *Robinson* v. *Robinson* (7); *Free Fishers of Whitstable* v. *Foreman* (8); *Buckeridge* v. *Ingram* (9); *Earl of Stafford* v. *Buckley* (10); *Howse* v. *Chapman* (11); *Rex* v. *Winstanley* (12); *Attorney-General* v. *Jones* (13); *Thornton* v. *Kempson* (14); *Ashton* v. *Lord Langdale* (15); *Negus* v. *Coulter* (16). This security is not similar to the debenture of a railway company. A railway company is a going concern, and the debenture only gives a security on the undertaking. Here the whole of the tolls are assigned, not merely the net income, and there is no reason why a receiver should not take the gross tolls.

COTTON, L.J.:—

This is an appeal from Mr. Justice *Chitty*, and the question to be decided in the appeal is whether certain debenture bonds issued under an Act, to which I shall refer, by the Commissioners for the Haven of *Great Yarmouth*, are prevented from being given

(1) 4 Ves. 430, n.
(2) 10 Ves. 41, 44.
(3) 28 Beav. 379.
(4) 30 Beav. 153.
(5) 4 Ch. D. 651.
(6) 6 Ch. D. 655.
(7) 1 D. M. & G. 247.
(8) Law Rep. 2 C. P. 688.
(9) 2 Ves. 652.
(10) 2 Ves. Sen. 170.
(11) 4 Ves. 542.
(12) 8 Price, 180.
(13) 1 Mac. & G. 574.
(14) Kay, 592.
(15) 4 De G. & Sm. 402.
(16) Amb. 367.

for charitable purposes by the Act of the 9 Geo. 2, c. 36, which has been generally, though improperly, called the *Statute of Mortmain*. Of course, the first question is, what is prohibited by that statute, and then we have to see whether the particular things which we have to deal with do come within the provisions of the statute. The effect of the statute is this. It prevents from being bequeathed for charitable purposes, all "manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever." I need not go through the rest of the Act, because it applies to sums of money to be laid out in land, the only suggestion as regards what is here referred to is, either that these bonds are hereditaments, or that although they are not lands or hereditaments, yet they are in respect of land, and therefore are prevented from being bequeathed for charitable purposes. We must look at the Act under which these bonds are issued, which is the 5 & 6 Will. 4, c. xlix., and see what its provisions are. It is not the first Act relating to the haven of *Great Yarmouth*, but it is the one which appears to govern this case. The Commissioners are appointed, and by sect. 4 of the Act the property of the former Commissioners is vested in the Commissioners under the Act. The property vested in them is the building called *Haven House*, and all warehouses, workshops, and other buildings and erections at and near the mouth of the said haven belonging or appertaining to the said haven, and the materials thereof, and then the present Act vests in them the piers, jetties, breakwaters, sluices, docks, and other works belonging to the said haven. Power is then given to the Commissioners to borrow money. That power is given by the 85th section, and that section authorizes them from time to time to borrow and take up at interest any sum or sums of money not exceeding £20,000 upon the credit of the duties by the Act granted. Then the Commissioners are empowered to mortgage, assign, or charge any or all of the said duties by the Act granted. The only thing, therefore, which they have power to mortgage is the duties which they have authority to levy under the Act. Then we have the form of the instrument which is to effect that mortgage, "In consideration of the sum of £ —— advanced on land," the Commissioners assign unto the person who lends the

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money, "such proportion of the duties arising by virtue of the said Act as the said sum of £ —— doth or shall bear to the whole sum which hath or shall have been or may at any time be borrowed." Then there is a provision that the sums of money to be borrowed in that way are to be paid *pro ratâ*, and not to have precedence, in accordance with the time the money is advanced, and security is given. Now we will look and see what those instruments are charging. The duties are given by the 42nd section, they are of two classes—duties on every vessel which shall enter into the haven, and duties in respect of goods which are either landed or exported. Those duties are in no way dependent upon the vessels using any land which is vested in the Commissioners. They are duties to be paid by every vessel which shall enter the haven, and every vessel which shall be laden or unladen there, but the soil which they anchor in, if they do anchor, is not in any way vested in the Commissioners, and the vessels, even although they do not anchor, are chargeable with that duty. Then as regards the goods, there is a duty charged on every quarter of wheat and other things—upon every ton of all other goods imported or exported to or from the said haven or roads, because even if the vessels do not come into the haven, but remain in the roads, the duties are charged just the same.

Now, is that in any way a hereditament within the meaning of the section? In my opinion it is not. It is very true that the section of the 9 Geo. 2, c. 36, which I have read, says "no hereditaments whatsoever." There may be hereditaments which are entirely personal, and it has never been held that those are within the Act, but what is here pointed to are hereditaments connected with the realty, and here it is said this is an incorporeal hereditament of that character. In my opinion that is not so. What is the definition of an incorporeal hereditament? *Blackstone* has put it for us in his Commentaries (1). "It is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exerciseable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses." In my

(1) Ed. of 1826, Book II. p. 20.

opinion with regard to that definition, you cannot possibly say that this duty is a hereditament within the meaning of the section. It is not in any way inseparably connected with, and certainly not in any way issuing out of any land. It is a duty which is to be collected by the Commissioners on vessels which may come into the roads, or the haven, or in respect of goods which are landed, or exported, from the haven, or from or to vessels which are in the roads. It is very true that the Commissioners have duties to perform, and duties connected with land, and probably that is the reason why the right to claim these tolls was vested in them. But that does not make the tolls in any way an incorporeal hereditament so connected with the land as to be within the mischief of the statute, or within the meaning of the statute.

Then is it in any way an interest in land? What I have already said answers that. It is not connected with or incident to the land, but it is that which is granted to the Commissioners who have duties imposed upon them, connected with the land of the haven. In my opinion, therefore, if we come to look at this case severed from decisions, it cannot be said that these bonds which the testator had, were either an hereditament within the meaning of the statute or an interest in land of any kind whatsoever.

But then it was said that decisions have settled the matter, and that those decisions ought not to be departed from. The case which was principally relied upon, and which we had very much pressed upon us, as well as the cases which depend upon it, was *Knapp* v. *Williams* (1). I said during the argument that I thought it very objectionable, either in an argument or a judgment, that a mere case should be referred to as having decided that something was within the statute, in such a way that it must govern the case before the Court, without considering the reasons for the decision. Of course we are bound to respect decisions, but in my view we ought to look at them, and see not only whether there is a decision that certain tolls are within the statute, but to see upon what ground those decisions were arrived at, and then to see whether those grounds apply to the question

(1) 4 Ves. 430, n.

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which is before us. As regards *Knapp* v. *Williams* (1), it is open to this remark, that we do not know exactly how it came to be where it is in the note, or who gave the report of it. It is very short, and although it appears undoubtedly from the report that nothing there was charged except the tolls paid on a turnpike road, yet we cannot forget that Lord *St. Leonards* said this in *Myers* v. *Perigal* (2): "Some of the authorities cited have gone considerable lengths, as for instance the case of *Knapp* v. *Williams*, where there was the bequest of sums secured by a mortgage of turnpike tolls; but in that case it is to be observed there was an actual assignment of the real property on which the tolls were secured: there was therefore, something more than mere savouring of realty." If that was the fact, the decision could not be otherwise, because of course a mortgage of land is undoubtedly an interest in land within the meaning of the statute, but we have not been able to find whether in fact that was so, for although Lord Justice *Lindley* and I have looked at the passages in the Act of 10 Geo. 1, c. 6, and 11 Geo. 2, c. 6, under which these mortgages were issued, we have not been able to see the first Act (3). Though

(1) 4 Ves. 430, n.

(2) 2 D. M. & G. 619.

(3) The Reporter has inspected the Parliament Roll of the earlier Act referred to, which is the 3 Geo. 1, No. 34 (Private), intituled "An Act for repairing the highways from that part of *Counter's Bridge* which lies in the parish of *Kensington*, in the county of *Middlesex*, to the powder mills in the road to *Staines*, and to *Cranford Bridge* in the said county in the road to *Colnebridge*." Trustees are appointed by the Act, but no estate in any lands or hereditaments is given them. They are empowered to erect gates and turnpikes on or across any of the roads to which the Act relates, and to levy the tolls or duties therein mentioned, and to employ the proceeds in repairing the roads. They are further empowered to raise money for the purposes of the Act, and "from time to time by writing under their hands and seals to assign over the toll or duty hereby granted for the time or term for which it is hereby enacted to be paid, or any part thereof," for securing the repayment of the money advanced with interest, no mention being made of any hereditaments. No form of mortgage is given. The powers of the Act were to last for eleven years. But by the 11 Geo. 2, c. 6, which continued the two previous Acts, it was enacted that "The right and property of all and every of the said turnpikes and toll-houses erected or to be erected by the said former Acts or this present Act, shall be vested in the said trustees thereby or hereby appointed to put the said Acts in execution; and they and any five or more of them are hereby authorized and empowered to dispose thereof as they shall think proper, or to bring actions or prefer

we do find that the trustees have power to deal with some real estate which was vested in them, we cannot find whether these mortgages in fact did comprise real estate, which Lord *St. Leonards* thought they did. But even if they comprised the tolls only, what does *Lord Loughborough* say (1)? "From the nature of the interest created by the Act these tolls granted in perpetuity are certainly a hereditament: it is in its nature an interest affecting land." Now that was the ground on which he arrived at that decision, and even if the mortgages did not in fact comprise real estate, yet it may be that there the tolls were so far connected with the land that in his opinion they might be considered as an incorporeal hereditament connected with land, and therefore an hereditament within the meaning of the statute. But he goes on to say, "There is another species of toll which gives no right at all in the land." He therefore points to what, in my opinion, is the "duty" in this case: you may call it a toll or a duty. In that case he considered that tolls for the use of a turnpike road, and for the use of what was certainly vested in the trustees, of turnpikes and toll-houses, might be considered as so far connected with the land as to be an incorporeal hereditament within the statute. Therefore that decision does not apply to the present case, where the duties are of a very different nature; of course there the connection between the right to receive the toll and the repairing and keeping up of the road was very different from the connection which there is here between the right to receive these duties and the obligation which was thrown upon the Commissioners.

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bills of indictment against any person or persons who shall steal, take away, or break down or spoil the same."

And it was further enacted that "It shall be lawful for the trustees appointed or to be appointed by virtue of or in pursuance of the said recited Acts and this present Act, or any seven or more of them, at their public meeting from time to time during the term or terms before granted and hereby continued, by any writing under their hand, without any stamp thereupon, to borrow or raise any sum or sums of money on the credit of the tolls and duties by the said former Acts or this present Act granted or continued in such manner and by such ways and means as shall appear to them most proper and convenient for the paying off the moneys already owing, and assigning the present securities for the same or making such other securities as they shall think proper, and for the effectual carrying on the repairs of the said highways and completing the same."

(1) 4 Ves. 430, n.

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Then there was another case of *Ion* v. *Ashton* (1), before Lord *Romilly*, which was like the present. There it was held that the dock tolls were within the statute, and that they could not be given to charitable uses, but the Master of the Rolls expressly decided upon the authority of *Knapp* v. *Williams* (2). It may be that those dock tolls were so connected with the land as to come within the principle of *Knapp* v. *Williams*, but if he only decided it upon the authority of the decision in *Knapp* v. *Williams* I think he was wrong in doing so.

I do not decide this case as I do on the ground that these instruments only assign and mortgage the profits arising upon tolls after all expenses have been paid. I think, on the contrary, they assign the tolls themselves, and that those cases which have decided that where there is a debenture stock or debentures of a railway company which only mortgage the undertaking, that is to say, the profits arising from the tolls received by the railways, are not in point, and do not govern the present case. Other cases have been quoted in which it was held that the money secured by the police rate or poor-rate, or other similar rates, were within the statute. But that is a very different thing. The poor-rates are charged in respect of the occupation of land, and therefore those would be reasonably considered as arising out of or connected with land, as being incorporeal hereditaments arising from or connected with land.

There is another case which I think I ought to refer to here; because, although it is not a case directly bearing on what comes within the statute, it is a case which points to the distinction upon which I think this case ought to be decided. I mean the case of *Attorney-General* v. *Jones* (3), where the question was whether a large sum which had been paid under an Act of Parliament for the purchase of the *Skerries* lighthouse was to be considered as arising from land or not. The Act directed that the money arising from the sale of land should be invested in land. It was held in that case that the money really was paid for the lighthouse, which was land in respect of which the right was given to levy tolls on all passing ships; that is to say, it

(1) 28 Beav. 379. (2) 4 Ves. 430, n.
(3) 1 Mac. & G. 574.

was a franchise inseparably connected with that land, namely, the *Skerries* lighthouse, in respect of which these tolls were levied. The distinction is pointed out in that case by the Lord Chancellor, and is also pointed out by what was said by Mr. Justice *Bayley* in the case of *Rex* v. *Coke* (1), which was a question of how a lighthouse should be rated. What the Lord Chancellor says in that case (2) is: "The question then is, the house being clearly real property"—that is the lighthouse—"for there is no doubt about that, whether the privilege of receiving tolls, on condition of keeping up the light is not an incident or an addition to the income and the profit arising from the house, or whether it is a totally distinct and independent personal franchise, which in that case would be personalty, and not realty." That is the distinction. There he decided that as this particular lighthouse had to be kept in repair, and the right to receive the tolls was only an incident to that lighthouse being kept up and maintained by the person obtaining the tolls, that right was realty and not personalty. But he points to that which there might be, namely, a personal franchise not so connected with any land, and the passage in which he deals with the Act of Parliament in that particular case is at page 597. He says: "Now when I look to the Act of Parliament in the case before me, I find that the privilege is granted in consideration of erecting the house originally; that then the Act recites that the party had performed his condition by erecting the house; that he had incurred great loss, and had been put to great expense in building the house, which the tolls, as they then stood, were not sufficient to repay; and I find further that if he did not keep up the house (that is the particular house which he had so built), not merely for a certain time according to the original grant, but *in perpetuum* under the Act, then he was to forfeit the privilege which the letters patent in the first instance, and the Act afterwards, conferred upon him. The privilege, therefore, was connected with the mode in which he dealt with the house: he could not perform the duty anywhere else but in that house; and the tolls are limited in the same way, and in the very same words, in which the title to the house is enjoyed." Then he refers to what was said by Mr. Justice *Bayley* and

(1) 5 B. & C. 797. (2) 1 Mac. & G. 589.

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Mr. Justice *Littledale* in the case of *Rex* v. *Coke* (1) which I need not read, but which points to the same distinction as between a franchise simply connected with the house or building and land, and that which is only a duty and not so connected, although it may be connected with the obligation thrown upon the person to whom it is granted—an obligation with reference to holding of certain land or houses. In my opinion, therefore, none of the cases really are against the view which we take in this case. We ought to decide it in accordance with what in our opinion is the true construction of this Act of Parliament and the true nature of the duties which this Act enables the Commissioners to receive and to charge, for sums of money borrowed by them.

LINDLEY, L.J.:—

I am of the same opinion. The question we have to consider is whether a security given under the local and personal statute 5 & 6 Will. 4, c. xlix., upon the duties which the *Yarmouth* Haven Commissioners are empowered to take is or is not within the *Charitable Trusts Act* of 9 Geo. 2. That question cannot be answered simply by calling these duties tolls and saying the case is like that of *Knapp* v. *Williams* (2). We must look and see what the duties are, and see if they have any, and, if any, what, connection with lands, tenements, or other hereditaments of a like kind. To decide that question it is necessary to scan the Act of Parliament creating them and see what the Act of Parliament does. I am not going through the sections again. Lord Justice *Cotton* has called attention to them. But for this purpose the 42nd section is the most important. The 42nd section enables the Commissioners to levy the duties—the word "toll" is not in the section at all, nor is it in the security. The sums leviable and receivable by the Commissioners are called duties. Now those duties are payable by any ship which enters the haven. That is the short result of the first three sub-sections of sect. 42. Then there are other sub-sections which enable the Commissioners to levy duties on goods—wheat, barley, rye, malt, or other grain imported to or exported from the haven or road, in any vessel, and shall there be unshipped and afterwards reshipped on board the

(1) 5 B. & C. 797. (2) 4 Ves. 430, n.

same vessel, and exported from the said haven. Now that appears to me to throw a flood of light upon the nature of those duties. Just consider what it means. The *Yarmouth Roads* are to be ascertained from looking at the early part of sect. 42. Supposing a collier unloads in the *Roads* and puts her coal upon lighters, and the lighters take the coal to the beach. There is no use of anything vested in these Cmomissioners for any purpose whatever, but duties are payable by the Act in such a case, and though such tolls or duties as those are incorporeal hereditaments, they have nothing to do with land at all. This circumstance throws a great light upon the nature of these duties, and distinguishes them from such duties as we have to deal with in cases of turnpike tolls or dock tolls levied under Acts of Parliament, and which may or may not issue out of land or be so connected with land as to be within the meaning of the *Charitable Trusts Act*. What the form of security was in *Knapp* v. *Williams* (1) I have not been able to discover, and not knowing that, I cannot say whether *Knapp* v. *Williams* was right or wrong. Of course if Lord *St. Leonards* is right—if he has found out, as he is very likely to have done, what the security was, if it was a security on land, *Knapp* v. *Williams* ceases to present any difficulty at all. If he did not, then I should like, before I said anything more about *Knapp* v. *Williams*, to study the local and personal Act, which I have not been able to get, and which may throw some light upon it. I am not prepared to say that *Knapp* v. *Williams* is wrong, but I am prepared to say that it does not appear to be a case like this, and the duties here are not hereditaments within the true meaning of that expression in the *Charitable Trusts Act*. That appears to me the short answer to the case; and having regard to the comments made by Lord Justice *Cotton* upon the authorities, it is unnecessary to say more. The appeal ought to be allowed.

LOPES, L.J.:—

The question in this case is whether these duties come within the statute of 9 Geo. 2, c. 36, commonly called the *Mortmain Act*. Now to come within that statute these duties must be an hereditament or an interest in a hereditament. An here-

(1) 4 Ves. 430, n.

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ditament is defined to be a right issuing out of, or connected with, land. Now I come to the 85th section of the 5 & 6 Will. 4, c. xlix., which is the Act for improving the haven of *Great Yarmouth*, and which is the section which authorizes the Commissioners to mortgage, and it is material there to see what they may mortgage. Under that section they may mortgage the duties: there is no power to mortgage anything but the duties. Then it is material to look at sect. 42. This is the most important section of all, because by that section we learn what these duties which the Commissioners are empowered to mortgage are. By that section it is perfectly clear that these are duties which the Commissioners may levy upon any ship in respect of entering the harbour or haven, or in respect of any goods imported into that harbour, or exported out of that harbour or haven, in any vessel. It is not necessary that any vessel should touch the land. That being the case, I am clearly of opinion that these duties are not connected with any interest in land. They appear to me to be naked duties, if I may use the term—neither connected with the land, nor do they in any way issue out of it. Under those circumstances, to hold these duties to be hereditaments would be a refinement which I cannot adopt. Several cases were relied upon. The cases of *Knapp* v. *Williams* (1), *Ion* v. *Ashton* (2), and *Attorney-General* v. *Jones* (3). I do not comment upon those cases, because they have been already commented upon by Lord Justice *Cotton*, and I entirely agree with the distinction which he draws between those cases and the one which is now before us. I think, therefore, that this appeal ought to be allowed.

Solicitor for the Plaintiff: *R. S. Fraser.*

Solicitors for the Defendants: *Cattarns, Jehu, & Hughes*, agents for *Worship & Rising, Great Yarmouth.*

Hare & Co., for the Solicitor to the Treasury.

(1) 4 Ves. 430, n. (2) 28 Beav. 379

(3) 1 Mac. & G. 574.

M. W.

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In re WHITELEY.
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[1885 W. 454.]

Trustee—Investment—Real Securities—Mortgage of Trade Premises—Brickfield—Valuation of Houses—Return of Income by Tenant for Life—Lien.

A trustee is bound to conduct the business of the trust with the same care which an ordinary prudent man of business would take, having regard to the interests, both in the present and the future, of those for whom he feels bound to provide or who have a claim on him.

An investment on trade premises, such as freehold brickworks, though it is within the terms of a power to invest on real property, is not a proper investment of trust money, and trustees making such an investment, even on the advice of a competent solicitor and a competent surveyor, will be held liable for any loss.

Trustees who have invested trust funds upon house property are not liable for loss through subsequent depreciation provided the trustees took care, in making the investment, to act upon due inquiry, and a proper valuation and report made by a competent surveyor.

Trustees invested trust money on a hazardous security at 5 per cent., and paid the income to the tenant for life. The security having failed the trustees were ordered to replace the fund with interest at 4 per cent. from the time of the failure of the security :—

Held, that the tenant for life could not be called upon to return to the trustees 1 per cent., on the ground that the higher interest was due to its being a hazardous security.

Where trust money has been invested on an insufficient security, and the trustees are ordered to replace the fund, the *cestuis que trust* are entitled to a lien on the security until the fund is replaced.

The judgment of *Bacon*, V.C. affirmed.

THIS was an appeal from a judgment of Vice-Chancellor *Bacon* (1).

The action was brought by *Elizabeth Whiteley* and her infant children against the executors and trustees of the will of *Benjamin Whiteley*, dated the 19th of March, 1874, seeking to make them answerable for the loss of a legacy of £5000, which, it was alleged, had been invested by them on insufficient securities.

The will contained a power to invest the fund on certain investments, including "real securities in *England* or *Wales*." The trustees invested £3000 upon a mortgage at 5 per cent. of a free-

(1) 32 Ch. D. 196.

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hold brickfield, on which the business of brickmaking was being carried on, containing about ten acres, "with the engine-house, sheds, brick and pipe kilns, and buildings thereon, and all fixtures and fittings thereon." The remaining £2000 they invested on mortgage at 5 per cent. on four small freehold houses, one used as a shop, in *Salford*, near *Manchester*. The owners of the brickfield became bankrupt in October, 1884, and the owner of the four houses also filed a petition for liquidation; and the property in both cases being found insufficient for payment of the money advanced by the trustees, the present action was brought.

The circumstances under which the investments were made are fully stated in the previous report.

The Vice-Chancellor held that the trustees were not authorized by the power of investing in "real securities" to invest the money on the brickfield, and must be responsible for the failure of the investment; but that the trustees had exercised sufficient caution with respect to the mortgage of the four houses, and were not responsible for the insufficiency of that investment. The Defendants appealed from this judgment so far as related to the mortgage of the brickfield, and the Plaintiffs gave cross notice of appeal from the judgment so far as related to the mortgage of the four houses.

The arguments were the same as those used in the Court below, which are fully stated in the previous report.

Hemming, Q.C., and *W. Baker*, for the Defendants.

Marten, Q.C., and *Seward Brice*, for the Plaintiffs.

Hemming, Q.C., in reply, contended that if the trustees were held accountable for the insufficiency of either of the investments the Plaintiff tenant for life ought to recoup one fifth of the interest received by her. She could not complain of the investments being hazardous, and yet retain the high interest which was due to their being hazardous. She was, therefore, only entitled to 4 per cent. instead of 5 per cent.: *Fry* v. *Tapson* (1).

The judgment also was erroneous in giving the Plaintiffs a lien upon the investments till sold.

(1) 28 Ch. D. 268.

The following authorities were also cited in the course of the argument: *Coggs* v. *Bernard* (1); *Beal* v. *South Devon Railway Company* (2); *Re Pearson* (3); *Budge* v. *Gummow* (4); *Stickney* v. *Sewell* (5); *Royds* v. *Royds* (6); *Mant* v. *Leith* (7); *Stretton* v. *Ashmall* (8); *Speight* v. *Gaunt* (9); *Lewin* on Trusts (10).

COTTON, L.J.:—

This is an appeal and a cross appeal from a judgment of Vice-Chancellor *Bacon*.

The appeal complains of the judgment so far as it finds the trustees, who are the Defendants, liable for loss incurred in regard to an investment of £3000 on property which I will call the brickfield. The cross appeal is an appeal against his decision that the trustees were not liable for the loss incurred on the investment of £2000 upon mortgage of some freehold houses. I will first consider the appeal.

It was contended in the first place that the decision of the Vice-Chancellor against the trustees proceeded on this ground—that the investment was not within the power to invest, which, so far as applicable to the present case, was to invest upon real securities. The judgment of the Vice-Chancellor does to some extent favour that view, but I doubt whether he really meant that it was not real security. I think he must have rather meant it was not such a real security as a trustee was authorized to invest such a sum of money upon. However, we must consider whether this is, or is not, within the power to invest on real security. I am of opinion it is real security, and if the Vice-Chancellor based his decision against the trustees on the view that this was not real security, that is to say, not a security within the power granted to the trustees, I am obliged to differ from him. It is very true that the value of this piece of land, being a brickfield, depended on the trade for which it was being used, and on the machinery and plant and buildings which were on the land; but the land is

(1) Sm. L. C. 7th Ed. vol. i. p. 210, 211.
(2) 3 H. & C. 337.
(3) 51 L. T. (N.S.) 692.
(4) Law Rep. 7 Ch. 719.
(5) 1 My. & Cr. 8.
(6) 14 Beav. 54.
(7) 15 Beav. 524.
(8) 3 Drew. 9.
(9) 22 Ch. D. 727; 9 App. Cas. 1.
(10) 8th Ed. p. 325.

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real security, and the mortgage on the land is undoubtedly a real security. It does not become less a real security because there are buildings upon it, or because those buildings or the machinery in the buildings, and plant, are used for the purpose of a trade. It is still real security, but although it is real security it does not follow that the trustees are free from liability in respect of loss incurred by lending on that security. It must be considered whether it was proper for the trustees, having regard, not only to the rules laid down by the Court, but to the special circumstances of the case, to invest the sum which they did on that security.

I have mentioned that this was a brickfield with buildings upon it, and with plant and machinery. Before we consider how far the trustees were justified in lending on that security, I think we ought to consider the question which is applicable both to this case and to the cross appeal, namely, what are the duties and liabilities of trustees. As I understand it the rule is this. They must take such care in conducting the business of the trust as a reasonably cautious man would use, having regard, not only to the interests of those who are entitled to the income, but to the interests of those who will take in future. That is to say, it is not like a man simply investing his own money where his object may be a larger present income than he can get from a safer security; but trustees are bound to preserve the money for those entitled to the *corpus* in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present. And in doing so they must use such caution as a reasonably prudent man would with reference to transactions in which he may be engaged of a similar nature.

In my opinion a trustee is not bound to have special knowledge. Where there is any special knowledge required, he may, and ought to consult those who could advise him from their special knowledge,—lawyers in the case of legal matters, and experts as to the value of property where there is any question as to the value of property. But I cannot accede to the view which Mr. *Hemming* pressed upon us so very much, that you must consider whether the trustee is or is not possessed of special skill and ability. If he likes to undertake the duty of

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a trustee (although I am not for my part at all inclined to bear hardly on a trustee who acts honestly) he must be dealt with as an ordinary man of ordinary intelligence. Having said that, let us look at what was done by the trustees as regards the investment on the brickfield.

A solicitor apparently was consulted, and he also consulted as to the investment a Mr. *Utley*, who seems to have been a very competent surveyor, to advise him as regarded the value of the property. He was advised by Mr. *Utley* that £3000 could be safely lent on this property, and I may say in his favour that that report, although it does not mention (as I think it would have been better to have done) what was the value of the property, does call attention to the fact that a wider margin had been allowed as regards this property because it was being used as a brickfield. So far one might say there are circumstances strongly in favour of the trustees not being liable for this investment. But still, is that all? In my opinion it is not. The property was of very small extent. It was only ten acres with buildings upon it, and plant and machinery, which were only fit for the purpose of brickmaking, and in my opinion an ordinarily prudent man having regard to the rights of those interested in the sum to be invested, even although it produced a larger interest than was usually got for mortgages, would have done something more. That is to say, there were facts patent on the face of the land—the real security upon which they were going to lend their trust money—which in my opinion would have made a prudent man inquire further, and if they had, they would have found out from Mr. *Utley* (for I take his evidence) that in arriving at the value of £7000 (or rather £6400, because he makes a deduction if it was sold not as a going concern), he valued the land only at £2000, and then he made up the remainder of the value by £2400 attributed to the buildings and £2600 attributed to the plant and machinery. Now, in my opinion, a prudent man if he had seen that report would not have lent so large a sum. It is true it was real security, but the real security depended for its value on the trade of brickmaking to be carried on there, and on the value of the buildings and machinery which could be only used for that particular business,

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and that particular business, though I do not say it was a specially hazardous one, was one which few people would be willing to bid for and undertake if it was necessary to call in the money, and also few people would be ready to take it as a security if the then tenant was not able successfully to carry on the trade. There are many contingencies upon which such a trade depends, and if the property had been reasonably available for other purposes that would not have induced me to hold the trustee liable. But it was not. It was simply machinery and buildings useful for this purpose.

I have not adverted to the fact that in a brickfield you are constantly exhausting the security, but I think that ought not to be taken into consideration in the present case, because the loss which has occurred has been in no way attributable to the exhaustion of the brick earth, though I agree it would require the trustee to exercise more caution in lending the money when the security is on that which from its very nature necessarily involves a diminution of the substance of the security. In my opinion, therefore, the decision upon this part of the case of the Vice-Chancellor was right, and the appeal fails.

We then come to the cross appeal. There again the trustees consulted the same surveyor whom they had previously consulted, Mr. *Utley*, and he stated what the rental was and laid down what was the net rental, or rather the profit rental after paying the ground rent, and he advised that it was a good security for this money. Then there was this also in favour of the trustees,—that a building society had advanced £2200 on this property, and their mortgage had been reduced and the balance of it was paid off by the money advanced by the trustees. It is said that we ought to reverse the finding of the Vice-Chancellor, and hold that the property having turned out unfortunately the trustees ought to bear the loss occasioned by that. Now upon what ground is that put? One side called these houses good properties, the others speak of them in different terms. They are not first-rate residential houses, but they are residences fit for the people who I presume would reside in that part of *Manchester*. One of the houses seems to have been a shop which fetched a good rental. They have been called cottages, but it

seems to me it is wrong to speak of them as cottage property. It is said that there was a flood some years before, which had materially injured them. That was a matter specially within the cognizance and knowledge of Mr. *Utley*, and upon the evidence I should not say that the result was that that flood had caused material or apparent injury or depreciation of value of the houses. True, subsequently there had been another flood which certainly caused a great depreciation in the value of these houses, and they, when put up for sale realized enough to pay the principal, but not enough to pay the principal, interest, and costs. In my opinion the trustees ought not to be held liable for such an investment. There was nothing in the very nature of the security (which was a real security) which would call their attention to the question, whether they ought to make further inquiries notwithstanding the report of the surveyor, and in my opinion one ought not to act harshly against trustees so far as to deter honest reasonable men from undertaking that duty. In saying I do not hold them liable, I refer to this, that there is not a suggestion that their conduct was other than honest, that they had no indirect or personal motive in making this investment, or were doing otherwise than acting on the advice which they received and which they had no reason to doubt—that it was a good security for the money they proposed to invest.

In my opinion, therefore, the cross-appeal, as well as the appeal, has failed.

But then there were two minor points raised by Mr. *Hemming* on behalf of the trustees. No interest, I think, was paid on the £2000. On the £3000, as far as I understand, 5 per cent. interest was paid down to August, 1884, and the Vice-Chancellor has charged the trustees with the money and interest at 4 per cent. from that date. Mr. *Hemming* said, "Yes, but we ought to be charged with interest at that rate only from the time when the investment was made; or get the benefit of the additional 1 per cent. paid to the tenant for life." Now it is of course obvious that such a contention as that could not prevail as against the parties interested in the *corpus*, because they have not received any part of that interest which has been paid to the tenant for life, but in my opinion it would not be right even as against the

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tenant for life to stop her future income, that is to say, to treat her as having received in the 5 per cent. part of the 4 per cent. with which the trustees are chargeable when she received that 5 per cent. from the trustees as income of the trust fund. They took upon themselves so to deal with it, and I quite think and believe that they honestly considered that that was a safe security, and would go on producing that sum, and although we hold that they are liable for the loss upon that investment, yet it is not entirely a wrong investment. The tenant for life during the time the money was invested, received the income she was entitled to receive, and the trustees were right in paying to her the interest, in fact, produced as income of an investment of the trust fund which, not being made with that prudence and caution which trustees ought to observe, has resulted in loss for which they are liable. But in my opinion it cannot be contended that the tenant for life, who received from trustees for some years what they represented to be the income of the trust fund, is to be called upon to give up part of that, or to bring it into account in determining what interest she is to get on the sum for which the trustees are liable. There was indeed a case quoted, *Fry* v. *Tapson* (1), in which Mr. Justice *Kay* had done that. That is the only case, so far as I know, in which such a principle has ever been applied, and the only one quoted to us by Mr. *Hemming*. The point does not seem to have been specially argued; but if Mr. Justice *Kay* intended to lay that down as a general proposition, and not one depending upon the circumstances of the case before him, in my opinion his judgment was erroneous.

There is one other point which I think Mr. *Hemming* referred to, namely, he says the judgment was wrong in declaring that the *cestuis que trust* had a lien on this property till it was sold. Now, in my opinion, in the ordinary course of things it would be right to direct the property to be sold, and to make the trustees answerable for any loss on the sale; but the trustees desiring that that course should not be taken, and that the brickfield should not be put up for sale at present, the sale is postponed at their desire. Till there is a sale, and the property is realized, it is quite right to say that those who are interested in the

(1) 28 Ch. D. 268.

trust should have a lien on, or claim to be enforced against the property, if the money is not otherwise provided, for that which the trustees, in error and for want of sufficient care, invested on that property. If the trustees desired that there should be an immediate sale, that would be a different matter; but as I understand they desire that there should be delay, so that if trade revives, the property may sell better, and in that view in my opinion it was quite right to say that till sale the persons interested in the trust should have a lien on this security on which the trust money was invested.

In my opinion, therefore, the result is, that both appeals fail.

LINDLEY, L.J.:—

The principle applicable to cases of this description was stated by the late Master of the Rolls in *Speight* v. *Gaunt* (1) to be that a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. I accept this principle; but in applying it care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low; lower than it has ever yet been fixed, and lower certainly than the House of Lords or this Court endeavoured to fix it in *Speight* v. *Gaunt* (2).

Such being the principle, we have to apply it to this case, and to consider the two investments which the trustees made. One

(1) 22 Ch. D. 739. (2) 22 Ch. D. 727; 9 App. Cas. 1.

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observation applies to both of them, viz., that the trustees acted *bonâ fide*, and obtained and acted on the advice of a solicitor and valuer who were apparently competent men in their respective professions. It was contended on behalf of the trustees that this circumstance alone was enough to exonerate the trustees from liability. But this contention goes too far. If it were to prevail the Court would in effect decide that trustees could delegate their trust to any competent persons, and so terminate their own responsibility. This, however, trustees cannot do. They may and must seek advice on matters they do not themselves understand; but in acting on advice given to them they must act with that prudence which I have already endeavoured to describe.

Now as regards the investment of the £3000 on the brickfield, I cannot bring myself to say that the security was one which a prudent man, investing money with a view to preserve it for the benefit of others as well as of himself, would have lent money upon. As an abstract proposition I am not prepared to say that a freehold brickfield cannot be a real security within the meaning of the power. It would clearly be a real security within the power if the value of the land, apart from the particular trade carried on upon it, was sufficient to secure the sum advanced. But where, as here, the value of the land, apart from the particular trade of brick-making carried on upon it, is nothing like the sum advanced, the whole aspect of the case changes. The value of such a brickfield as a security for money lent on it in excess of the value of the land as land, depends on the trade of brick-making, and on the probability of a purchaser being found to buy and work the brickfield in the event of the mortgage money being called in. This depends on the state of the brick-making trade, and on the profits which can be made by selling bricks made in the field in question. Moreover a lender of money on such a security must exercise unusual vigilance in seeing that he does not allow the money to remain uncalled in longer than is safe. A security of so hazardous a nature as this, though in one sense and to some extent a real security, is not a proper security for trust money; it is not in truth a real security for any sum beyond the value of the land as land. The security for more than this value is the solvency of the borrower, and the

trade carried on by him. No prudent man investing money for the benefit of himself and others, would, in my opinion, have invested so large a sum as £3000 upon so hazardous a security as this brickfield, even after receiving Mr. *Utley's* report. In my opinion, therefore, the Vice-Chancellor was right in holding the trustees responsible for the loss sustained by this investment.

As regards the investment of £2000 on the four freehold houses in *Earl Street, Lower Broughton*, I am not prepared to say that an ordinary prudent man investing money for the benefit of others, as well as of himself, would not have advanced £2000 on the security of these houses. The security in this case was ordinary house property. There was nothing exceptional or unusually hazardous in it. The rental exceeded the interest on the sum advanced. A building society had advanced more than £2000 upon the houses, and an apparently competent valuer, consulted by the trustees, expressed his opinion to be that the houses were good security for £2000. An ordinary prudent man having no special knowledge of the value of house property, might well act on this advice, and see no reason for distrusting it. Moreover, a further advance was obtained on these same houses from another quarter, and when put up for sale more than £2000 was bid for them. The sum bid was not enough to cover principal, interest, and costs, and was not therefore accepted. Under these circumstances, although the result has been unfortunate, I do not think it is made out that the trustees took less care than they ought when they made the investment. No other want of diligence was proved. As regards this investment, therefore, I also agree with the Vice-Chancellor.

Whilst on the one hand the Court ought not to encourage laxity and want of care, on the other hand the Court ought not to prevent people from becoming trustees by converting honest trustees into insurers of the moneys committed to their care. I have endeavoured to avoid both errors.

I agree with Lord Justice *Cotton* on the point as to interest on the £3000 raised by Mr. *Hemming*. The tenant for life cannot be made to refund the interest paid to her, or to recoup the trustees the difference between 5 per cent. and 4 per cent.

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In my judgment, therefore, both appeals ought to be dismissed.

LOPES, L.J.:—

The law with respect to the duties and responsibilities of trustees, and the distinction between those losses of trust funds for which they are, and those for which they are not liable, are matters of such general importance and interest to the community at large, that I am anxious to add my own expression of opinion to the judgments which have been already delivered.

The duty of a trustee in investing the money of his *cestuis que trust* may be thus defined. He must choose those investments only which are within the terms of his trust. In the selection of investments within the terms of his trust he must use the care and caution which an ordinary man of business, regardful of the pecuniary interests in the future of those having claims upon him would exercise in the management of his own property. So much I think should be required of a trustee—it would be unreasonable to require more.

I proceed to apply to the facts of the present case this definition. The trustees under the will of *Benjamin Whiteley* were empowered to invest trust moneys held thereunder in the securities therein mentioned, which comprised the usual trustees' investments and "real securities in *England* and *Wales*." The Defendants invested £3000 subject to the trusts of the will upon a 5 per cent. mortgage dated the 12th of January, 1878, by Messrs. *Barstow & Hartley*, brick and sanitary tube manufacturers—of a freehold brickfield containing about ten acres, with the machinery, brick, and pipe kilns, and buildings thereon situate at or near *Pontefract*, being the premises upon which the mortgagors were then carrying on their business; £2000 the trustees invested upon a 5 per cent. mortgage, dated the 13th of June, 1878, of four small freehold houses, one used as a shop, in *Earl Street, Lower Broughton Road, Salford*, near *Manchester*.

The Plaintiff, who was entitled to the income arising from the £5000, regularly received the interest of the £3000 mortgage until 1884, when in March of that year Messrs. *Barstow & Hartley*,

the mortgagors of the brickworks, became embarrassed, and in October, 1884, they were adjudicated bankrupts.

The mortgagor of the four houses never paid any interest on the £2000. In April, 1879, he filed a petition for liquidation, and the Defendants had since been, and were now, in possession of that property.

With regard to the mortgage for £3000, which I call the brickfield mortgage, the land by itself was not worth more than £1500; any value beyond that sum was attributable to the plant and machinery, and more especially to the trade to be carried on upon the land. It has been contended that this investment is unauthorized by the power, that it is not within the terms of the trust, that it is not in fact a real security. At first I entertained some doubt on this subject. I am clear, however, that it is technically a real security, because if only £500 had been advanced, no objection could have been taken to the character of the investment.

The question is, assuming it to be technically a real security, whether it is a proper real security, whether it is such an investment as an ordinary prudent man of business, regardful of the pecuniary interests in the future of those having claims upon him, would select if he was acting for himself with regard to his own property. I am clearly of opinion the investment in question does not answer this description, its value mainly depends on the success of a speculative and fluctuating business, a business for which it is difficult to find customers, a business largely dependent on the energy and solvency of those working it, a business of necessity of precarious duration, which cannot be carried on without such an excavation and destruction of the soil as must eventually leave what remains nearly useless for agricultural and other purposes.

It is said that the trustees could call in or realize the security before any serious depreciation of the property took place. I do not think trustees are justified in investing trust funds in any property where active and exceptional vigilance and diligence is requisite on their part to anticipate and prevent a loss to their *cestuis que trust.*

It was argued on the part of the trustees that they had obtained

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the assistance of competent persons to advise them as to the sufficiency of the security. This assistance trustees ought to seek if the circumstances of the case make it necessary, they are not exonerated thereby, but are responsible if the security is improvident. For these reasons I am clearly of opinion that this was an improper and improvident investment.

With regard to the mortgage for £2000 on the four freehold houses I am not prepared, after what has been said by the other members of the Court, to say the investment was improper, nor to differ from the decision of the Vice-Chancellor, though if I had been sitting alone I should not have arrived at a conclusion favourable to the trustees without much hesitation.

I agree with what has been said as to interest.

Both appeals will therefore be dismissed.

Solicitors for the Plaintiffs: *Jackson & Co.*, agents for *Jackson & Jackson, Middlesborough.*

Solicitors for the Defendants: *Mackenzie & Rhodes*, for *G. Rhodes, Halifax.*

M. W.

C. A. 1886 NORTH, J. *May* 14, 15, 17, 18. C. A. *June* 30; *July* 1, 2, 30.

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[1886 B. 1652.]

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 73, 74, 75, 76, 250 [*Revised Ed. Statutes, vol. xii., pp.* 673, 675, 676, 726]—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 106 [*Revised Ed. Statutes, vol. xiv., p.* 441]—"*Sewer*"—"*Drain*"—*Drainage of contiguous Houses by "Combined Operation"—Notice of Action against District Board.*

The owner of a plot of ground within the metropolitan district on which he was about to build fifteen contiguous houses, sent to the local board notice of his intention to lay down upon it a pipe drain running parallel to the houses, through which the houses would be drained into the main sewer belonging to the Metropolitan Board. The local board signified their approval of the scheme by letter and entered their approval in their books, but made no formal order. The owner completed the drain:—

Held, by *North*, J., that sect. 74 of the *Metropolis Local Management Act*, 1855, which enables a district board to order a group or block of contiguous houses to be drained by a "combined operation," is supplemental to

sect. 73, and like that section applies only to existing houses—that the local board had therefore no power to make an order for draining by a "combined operation" a set of houses in course of erection, and that if they had, their approval of a scheme proposed by the owner did not amount to an order—that the drain in question was therefore not a "drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and was a "sewer" and not a "drain" within the meaning of sect. 250, and by virtue of sect. 68 vested in the local board :—

Held on appeal, by *Cotton* and *Lindley*, L.JJ., *dissentiente Lopes*, L.J., that although sect. 74 did not give the board power to order drainage by a combined operation except in the case of existing houses, the general words of sect. 76 gave them this power in the case of houses about to be built; that their approval of the scheme was an order, and that the drain in question was therefore a "drain" and not a "sewer" within the meaning of sect. 250, and did not vest in the local board :—

Held, by *North*, J., that sect. 106 of the *Metropolis Local Management Acts Amendment Act*, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity :—

Held, by *Lopes*, L.J. (*Cotton* and *Lindley*, L.JJ., not dissenting), that that section does not apply to an action for an injunction to restrain a nuisance.

MOTION for an injunction to restrain the Defendants, the Local Board of Works for the *Poplar* District, from committing a nuisance.

The Plaintiff *F. Bateman* was the owner of a block of fifteen contiguous houses known as *Vulcan Terrace*, situate on the north side of and fronting upon *Wallis Road*, *Victoria Park*, within the Defendants' district; the Plaintiff *James Meckiff* was the occupier of one of the houses. The writ claimed (1) an injunction to restrain the Defendants from permitting offensive and pestilential smells to emanate from the sewers and drains of and under the control of the Defendants situate near to, at the rear, and in the front of the houses in *Vulcan Terrace*, so as to constitute a nuisance and be injurious to the health of the tenants and the occupiers of the houses; (2) damages for loss sustained by reason of the said nuisance rendering the houses unhealthy and uninhabitable.

Under *Wallis Road* (which ran east and west) and in front of *Vulcan Terrace* was a 12-inch sewer, which was admitted to belong to the Defendants. At the rear of *Vulcan Terrace*, and

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passing under the back gardens of the houses, was a 9-inch sewer or drain, into which the sewage of each of the houses was carried by a drain from each house respectively, and which carried the sewage of all the houses into a main sewer under *Windsor Road* (a road running north and south near the west end of *Vulcan Terrace*). This main sewer was the property of the Metropolitan Board of Works.

The principal question in the case was, whether the 9-inch drain at the rear of *Vulcan Terrace* was the property of the Defendants or of the owner of the houses, and this depended upon whether it was a "sewer" or a "drain" within the meaning of sect. 250 of the *Metropolis Local Management Act*, 1855. If it was a "sewer" it was, by sect. 68 of that Act, vested in the Defendants; if it was a "drain" it was not vested in them.

The 9-inch drain was constructed in the year 1877, when *Vulcan Terrace* was built by *G. T. Horell*, the then owner of the land. On the 7th of April, 1877, a notice in writing was served on his behalf, by *Dobbs*, the builder who was then erecting the houses for him, upon the *Poplar* Board, which stated that "I intend on the expiration of seven clear days from the service hereof (unless I receive directions from you to the contrary) to build and lay 261 feet run 9-inch glazed stoneware pipe drain from the houses Nos. 1 to 15 inclusive on the north side of *Wallis Road*, in the parish of *Bow*, to connect with the main and district sewer in *Windsor Road*, to be constructed at the expense of *G. T. Horell*, the particulars of which are described on the plan annexed to this notice. I hereby undertake to abide by the regulations of the board in reference hereto." This notice was on a printed form supplied by the board. A schedule to the notice, signed by the surveyor to the board, stated that the charges of the board for making the connection of the intended drain with the main sewer would be £2 4*s*. The construction of the proposed drain in accordance with the notice was approved by the board, an entry signifying such approval was made in the books of the board, and notice of their approval was given to *Dobbs* on the 11th of April, 1877, by a letter signed by the clerk to the board, which informed him that the plan had been approved by the board, and requested him to attend at the office of the board "in

order that the preliminary steps may be taken previously to the commencement of the works," and added "fee to pay, £2 4*s*." The 9-inch drain was constructed in accordance with the plan thus approved, and the houses were completed in September, 1877.

Another question in the case was whether before commencing the action the Plaintiff ought to have served a notice on the board as required by sect. 106 of the *Metropolis Local Management Acts Amendment Act*, 1862. No such notice had been served by the Plaintiff.

The Plaintiffs moved for an interlocutory injunction before Mr. Justice *North* on the 14th of May, 1886.

T. L. Wilkinson, and *G. W. Ellis*, for the Plaintiffs:—

The 9-inch drain at the rear of the houses is a "sewer" within the meaning of the definition contained in sect. 250 of the *Metropolis Local Management Act* of 1855—not a "drain" as defined by that section—and therefore, by sect. 68 (1), it is vested in the

(1) Sect. 68 provides that "All sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works as hereinafter mentioned, shall be vested in such vestry and board respectively."

By sect. 69: "The vestry of every parish mentioned in Schedule (A.) to this Act, and the board of works for every district mentioned in Schedule (B.) to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up, or destroyed under the powers herein contained, and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district."

Sect. 71: "Every district board and vestry shall, by providing proper traps or other coverings, or by ventilation, or by such other ways and means as shall be practicable for that purpose, prevent the effluvia of sewers from exhaling through gully-holes, gratings, or other openings of sewers in any of the streets or other places within their district or parish."

Sect. 72: "Every vestry and district board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary."

By sect. 73, "If any house or building, whether built before or after the commencement of this Act, situate within any such parish or district, be

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district board, and they are responsible for its condition, and liable for any nuisance occasioned by it. The only drain made

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found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, ... and all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads."

Sect. 74: "If it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist or be about to be constructed within one hundred feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation."

By sect. 75: "It shall not be lawful to erect any house or other building in any parish mentioned in Schedule (A.) to this Act, or in any district mentioned in Schedule (B.) to this Act, or to rebuild any house or building within any such parish or district which has been pulled down to or below the floor commonly called the ground floor, or to occupy any house or building so newly built or rebuilt, unless a drain and such branches thereto and other connected works, and apparatus, and water supply as hereinbefore mentioned be constructed and provided to the satisfaction of the surveyor of the vestry of such parish or board of works for such district."

By sect. 76: "Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship,

for the draining of a group of contiguous houses by a "combined operation" which comes within the definition of "drain" in sect. 250, is a drain constructed under the provisions of sect. 74. Sects. 73 and 74 apply only to the drainage of existing houses which is found to be insufficient—not to the drainage of houses being newly constructed, which is dealt with by sub-sects. 75 and 76; and the notice of the 7th of April, 1877, was an ordinary routine notice under sect. 76. The approval of the board was not an "order" within the meaning of sect. 74: *Vestry of Marylebone* v. *Viret* (1), shews the proper construction of sect. 73.

It may be objected that a month's notice ought to have been given to the Defendants under sect. 106 (2) of the *Metropolis Local*

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and with such branches thereto and other connected works, and apparatus, and water supply as hereinbefore mentioned, and as the vestry or board shall order, and the making of every such drain shall be under the survey and control of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice."

By sect. 250: "In the construction of this Act . . . . the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

(1) 19 C. B. (N.S.) 424, 440.

(2) Sect. 106: "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works, or any vestry or district board, or their clerk or any clerks, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said Acts or this Act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry, or where the action or proceeding shall be against such officer or other person acting under their or any of their directions, shall have been delivered to him or left at his office or place of abode, stating the cause of action or grounds of the proceeding or demand, and the name and place of abode of the intended plaintiff or claimant, and of his attorney or agent in the cause or proceeding; and upon the trial of any action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated

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Management Acts Amendment Act of 1862, before the action was commenced. But that provision does not apply to an action the principal object of which is to obtain an injunction to restrain an immediate injury: *Flower* v. *Local Board of Low Leyton* (1); *Attorney-General* v. *Hackney Local Board* (2).

The evidence establishes the alleged nuisance.

Napier Higgins, Q.C., and *Borthwick*, for the Defendants:—

Notice ought to have been given under sect. 106 of the Act of 1862. That Act applies to actions in respect of defaults, as well as in respect of acts of a district board: *Jolliffe* v. *Wallasey Local Board* (3). The character of the notice which ought to be given is shewn by *Mason* v. *Birkenhead Improvement Commissioners* (4). It is only in cases of serious and irreparable injury that the preliminary notice is not necessary: *Flower* v. *Local Board of Low Leyton*. The present case is not one of that nature.

The 9-inch drain is a "drain" within the definition in sect. 250.

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in the notice so served or delivered, and unless such notice be proved, the jury shall find for the defendant; and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action, or ground of claim or demand, and not afterwards, and every such action shall be laid and tried in the county or place where the cause of action accrued, and not elsewhere; and the defendant shall in any such action be at liberty to plead the general issue, and give the said recited Acts and this Act and all special matter in evidence thereunder; and it shall be lawful for the board or vestry, or any person to whom such notice is given as aforesaid, to tender amends to the plaintiff, his attorney or agent, at any time within one calendar month after service of such notice, and in case the same be not accepted, to plead such tender in bar, and (by leave of the Court) with the general issue or other plea or pleas; and if upon issue joined upon any plea pleaded to the whole action the jury find generally for the defendant, or if the plaintiff be nonsuited or discontinue, or if judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly; and in case amends have not been tendered as aforesaid, or in case the amends tendered be insufficient, it shall be lawful for the defendant, by leave of the Court, at any time before trial, to pay into Court under plea such sum of money as he may think proper, and (by the like leave) to plead the general issue or other plea or pleas, any rule of Court or practice to the contrary notwithstanding."

(1) 5 Ch. D. 347.
(2) Law Rep. 20 Eq. 626.
(3) Ibid. 9 C. P. 62.
(4) 6 H. & N. 72.

Sect. 74 applies to the drainage of a group of houses being newly built, as well as to a group of existing houses. If not, there is no machinery in the Act for a combined plan of drainage with regard to a group of houses about to be built. The notice of April, 1877, shews that the 9-inch drain was to be constructed at the expense of the owner of the houses, and that it was regarded by the parties as a "drain," not as a "sewer" which would belong to the board. The letter of the 11th of April, 1877, shews that it was intended that a formal order of approval should be made by the board.

[NORTH, J.:—In *Hammond* v. *Vestry of St. Pancras* (1) it seems to have been assumed that a drain into which two houses drain would be a "sewer" within sect. 250.]

The jury having there found that the drain in question was a sewer, the Court did not decide the point.

The evidence does not prove any nuisance.

T. L. Wilkinson, in reply:—

Sect. 74 is an adjunct to sect. 73, and is intended to mitigate its severity for the benefit of the owners of a group of contiguous houses, so that they may be drained less expensively by a "combined operation," instead of by a separate drain for each house. Sect. 73 speaks of a house being "found not to be drained by a sufficient drain." This can only apply to existing houses; that which does not already exist cannot be found to be insufficient. Sect. 74 refers to that which is "hereinbefore provided," and the provisions for the drainage of new houses are contained in sections subsequent to sect. 74. The policy of the Act is to vest in the local authority all drains which drain more than one house, so that the ownership may not be divided.

1886. May 18. NORTH, J. (after stating the facts, continued):—

The first question is whether the action is maintainable at all. It is said that it is not, because no proper notice of it has been given to the Defendants. That point, and the other point of law which I have to consider, are matters which might, perhaps, be

(1) Law Rep. 9 C. P. 316.

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more properly dealt with at the trial of the action than on a motion for an injunction, but, inasmuch as they have been raised and argued, and I have formed an opinion upon them, I shall not refrain from expressing it.

The question of notice turns upon the construction of sect. 106 of the *Metropolis Local Management Amendment Act* of 1862. At that time an action in a Court of Law and a suit in the Court of Chancery were entirely distinct proceedings. Although, no doubt, a Court of Law had then power to a limited extent to grant injunctions, yet it may be said that as a rule applications for injunctions were made to the Court of Chancery and not to the Courts of Common Law; the granting of injunctions in the Courts of Law was ancillary to other and substantially independent relief. Now, reading that section through, I have no doubt that it applied simply and solely to an action at law, not to a suit in equity, and that when it was passed it never crossed the mind of any one that it could be an impediment to any proceeding in a Court of Equity to obtain an injunction to restrain a nuisance. The various points referred to, that the jury are to decide the case, the absence of any reference whatever to a Judge, the mode of pleading indicated, pleading the general issue and giving special matter in evidence, and the directions with reference to a nonsuit and otherwise, all shew to demonstration that the section was intended to apply to an action at law as distinguished from a suit in equity. In the present case the action is brought for an injunction to restrain a nuisance. The claim is substantially for the injunction which is now sought, although there is a second paragraph which claims "Damages for the loss sustained by reason of the said nuisance rendering the said cottages unhealthy and untenantable." It seems to me that, whatever might be the state of things under sect. 264 of the *Public Health Act*, 1875, under this sect. 106 there is no reason whatever why an action for an injunction should be preceded by a month's notice. Under these circumstances it seems to me that this objection cannot prevail. And, even if the case had been under the *Public Health Act*, 1875, instead of under the *Metropolis Local Management Acts*, *Flower* v. *Local Board of Low Leyton* (1) seems to shew that I could not have refused to enter-

(1) 5 Ch. D. 347.

tain the action upon the ground that the notice had not been given.

The next question is whether the 9-inch drain at the back of the houses is a "drain" or a "sewer." If it is a sewer it is vested in the Defendants, so far as it is in their district, by the concluding words of sect. 68 of the Act of 1855. If, on the other hand, it is not a "sewer," but a "drain," then the Defendants are not responsible for its state, and cannot be made liable to the injunction which is now asked. This question depends upon the construction of sect. 250 of the Act of 1855, which says, "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." Now, pausing there for a moment, it is clear that the word "drain" means the mode by which one building is drained—the word "building" including premises within the same curtilage—and anything which is not a drain to be used for the drainage of one building does not come within that definition. Then there are these further words: "and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." Then there is a definition of the word "sewer," that it "shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies," so that we have a technical interpretation of the word "drain" for the purposes of the Act, which is smaller than the ordinary use of the word; other drains and sewers are called "sewers." Now, these fifteen houses are drained by the 9-inch drain at the back of them to which pipes are carried from each of the fifteen houses—from the water-closets, the sinks, and whatever other parts require drainage. Therefore, the drainage of each house is distinct, but this 9-inch drain is the common means by which all the fifteen houses are drained, and through the lower part of which, at any rate, all the contents of the drains of the fifteen houses reach the main sewer. It is clear, therefore, that this is not a "drain used for the drainage of one building only,

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or premises within the same curtilage." That being so, it must be a "sewer" within the meaning of the Act, unless it is covered by the last few words of the definition, namely, "any drain for draining a group or block of houses by a combined operation under the order of any vestry or district board."

The question, therefore, is whether it comes within those words. Now, in order to understand those words, and to apply the definition, it is necessary to turn to other sections of the Act, commencing with sect. 67. [His Lordship referred to sects. 68, 69, 70, 71, 72, 73, 74, 75, 76.]

It is admitted by counsel that the draining of houses by a "combined operation" is not referred to anywhere in the Act but in sect. 74.

The question is whether what was done as to these houses was a "combined operation" or not. When the houses were about to be constructed the person who was acting on behalf of the owner gave notice to the board of what was proposed to be done, and under that notice the works were done. The board seems to have approved of them. I do not find any order approving of them, nor do I think it necessary that there should be any such order, because, if the surveyor of the board approved of them, it seems to me quite sufficient for the purposes of the Act. The plan was approved of: there was no disapproval,—no order to do anything different; and the works were carried out in accordance with the section.

Now, looking at the sections which I have read, it seems to me clear that the 73rd section applies only to the case of an existing building, and provides for the drainage of an existing building being found defective, and it gives power to the vestry or board in that case to require what it considers a defective scheme of drainage to be given up, and another scheme substituted for it. It cannot be said that any house or building is found not to be sufficiently drained unless the house or building exists, or that there is a sewer of sufficient size within 100 feet of a building which does not exist, and it seems to me clear that section 73 provides for an alteration of the existing drainage of existing buildings by an order of the board, which the owner is obliged to carry out.

Then we come to sect. 74, and it appears to me that that section is to apply to a state of things similar to that which is dealt with by sect. 73. It provides for that which is not covered by sect. 73, namely, the case of existing contiguous buildings side by side, belonging very possibly to different owners, all drained into a cesspool or cesspools, or otherwise, in a way which is not considered sufficient by the vestry or board, and it enables them to do that which they could not have done under sect. 73 alone, namely, to require the different owners of the houses to combine together in constructing a sufficient drain for all the group of houses. If it had not been for sect. 74, all that the board could have done would have been to give notice to each of the owners of the different houses to drain his house in the way required by the board. But sect. 74 points out that there may be a group of contiguous or adjacent detached or semi-detached houses which may be drained more economically or advantageously in combination than separately—that is, more economically or advantageously to the persons who have got to pay for it, and also can be required by notice to do it. Therefore this section contemplates a combination which may have the result of producing economy or advantage to the owners to whom notice is to be given under sect. 73, and it enables the board to do what they could not otherwise have done, viz. enforce the sufficient draining of adjoining houses by requiring the owners to combine for the purpose, and all the provisions of sect. 73 as to a single house are by sect. 74 made to apply to a group or block of houses. It seems to me that sect. 73 clearly deals with houses already constructed, and with nothing else, and that sect. 74 is supplemental to sect. 73 for the purpose of giving a benefit to the owners of adjoining houses or a block of houses, instead of leaving them to do a great deal of unnecessary work and to incur a great deal of unnecessary expense, as would be the case if sect. 73 stood alone.

It is said that the words "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board" apply, and that the approval of the board is an "order." It seems to me that an approval is not an "order." If the scheme proposed by the owner or owners of the houses is approved of, no order is wanted. An order is wanted if

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what the owners propose is not approved of, and something else is required to be done by the board. Therefore, an "order" of a board does not mean a mere approval. An order is a thing from which under sect. 211 of the Act of 1855 there can be an appeal in the way there pointed out, and to say that a mere approval of what a builder has proposed is an order from which there can be an appeal seems to me to be rather absurd. When the board consent to what the builder proposes there is no reason for appeal, and no reason, therefore, for making an "order," and a mere approval is quite sufficient. In the present case it appears to me that there has been no "order" made by the board, and that, unless a drain for draining a group or block of houses by a combined operation is made under an order, it is not a "drain" within the definition in sect. 250.

It is said that it would be rather absurd that, when a builder, who is proposing to build new houses obtains the sanction of the board for the draining of several houses together, the drain should be a "sewer" under the 250th section, and yet that when exactly the same thing is done with respect to houses already built it should be a "drain," and should not vest in the board. But there is this distinction. When a man intends to build new houses he can make his proposal, and, if the board do not assent to it, he is not bound to build at all. But, if defective drainage is found to exist under circumstances to which sect. 73 applies, the board have power to say that the owners of a group of houses shall combine to do the required works. If a builder, building for the first time, makes a drain for the drainage of several houses, and that drain becomes a sewer, he knows what he is about, and he cannot complain if the result should be that it vests in the board. If, on the other hand, the owners of several houses can, by a board making a sewer close by and then giving them notice, be compelled to improve their drainage, the Legislature seems to have considered that it would be hard in such a case to take away from them the property in the drains and vest it in the board, and the Legislature seem to have drawn a distinction between the two cases. When the drain, which otherwise would be a "sewer," is made by a "combined operation," in that case they were content to leave the ownership of it in the owners

where it was before, and not take it out of them; but, when a drain is made for draining two or more new houses, that drain is under the definition of the Act a "sewer," and is to vest in the board.

It seems to me, therefore, that the 9-inch sewer or drain in the present case is a "sewer," and as such it is vested by sect. 68 in the board.

It was said that the notice which was given shews that all parties at the time thought that it was a "drain" and not a "sewer." I quite admit that; but that cannot affect the construction of the Act.

The only remaining question is one of fact, and on the evidence it appears to me that the Plaintiffs have proved that there is a substantial nuisance both from the 9-inch sewer and from the 12-inch sewer.

The Plaintiffs are, therefore, entitled to the injunction for which they ask, but it should be limited to "the 12-inch sewer and the 9-inch sewer in the affidavits mentioned."

W. L. C.

C. A.

The Defendants appealed. The appeal came on for hearing on the 30th of June, 1886.

Napier Higgins, Q.C., and *Borthwick*, for the Appellants:—

We contend that the 9-inch pipe is not a sewer within the meaning of the Act 18 & 19 Vict. c. 120, and is not vested in us, we therefore are not responsible for the nuisance arising from it. The point is a very serious one to local boards, and if this decision is upheld it will be necessary to apply to the Legislature. Formal notice was given to the board by the then owner of the land on which this block of houses is built of his intention to lay down this 9-inch pipe according to plans which he laid before the board. The scheme was approved, and an entry to that effect made in the books of the board, but no further order was drawn up, though notice of approval was given by letter. The owner then laid down this pipe. Mr. Justice *North* considered that what was done did not amount to making an order under sect. 74, and that if there was no order under that section the work was not a drain,

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but a sewer. We say that there was an order, it is not necessary that the order should be in any particular form. The board in fact pronounced an order, and if any necessity had arisen it might have been formally drawn up afterwards and would be operative from the time when it was pronounced. An order need not be made *in invitum*. The decision of the board would have been appealable under sect. 211 of the Act of 1855, if the board had refused to sanction the plan without modifications. Their determination therefore must be treated as an order. "Drain" is defined by sect. 250, and includes "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." We rely on this definition of "drain" as including the pipe in question. The definition in 25 & 26 Vict. c. 102, s. 112, tends the same way. Mr. Justice *North* was of opinion that sect. 74 applied only to the drainage of existing buildings belonging to different owners. This construction gives rise to great inconvenience and absurdity, and is not to be adopted without necessity. If it is correct, no local board can allow the most convenient and economical course of draining to be adopted as to a piece of land on which buildings have not yet been erected. Suppose sect. 74 only applies to existing houses, there is no inference that the board have not the power as to new houses. No communication with the main sewer can be effected without the leave of the board, and if the owner of a block of fifteen houses makes a claim of this kind, is the board bound to say to him "We cannot allow you to drain in this way—you must lay down fifteen separate drains?" By sect. 75 no house is to be built without drains constructed to the satisfaction of the board, and sect. 76 speaks of draining "directly or indirectly" into any sewer under the authority of the board, which appears to point at draining by a combined operation. By sect. 68 all sewers in the district are vested in the local board except such as are vested in the Metropolitan Board of Works. Sect. 69 obliges the local board to maintain them, and sect. 71 obliges them to prevent the escape of effluvia. We are therefore liable for any nuisance arising from the 12-inch pipe, which we admit to be a sewer and to be vested in us, but we say that there is not sufficient evidence of nuisance from it to warrant an injunction. Then

under sect. 106 of the Act of 1862 we were entitled to notice as there provided, and the Plaintiffs have not given any such notice: *Jolliffe* v. *Wallasey Local Board* (1); *Mason* v. *Birkenhead Improvement Commissioners* (2).

T. L. Wilkinson, and *Crispe*, for the Plaintiffs:—

If sect. 106 applies to a suit in equity at all, which Mr. Justice *North* held that it did not, it at all events does not apply to a suit to restrain a nuisance: *Attorney-General* v. *Hackney Local Board* (3); *Flower* v. *Local Board of Low Leyton* (4). Notice therefore was not necessary. Then as to the merits, we say that the 9-inch pipe is a "sewer," not a "drain," and is vested in the Defendants. It clearly is not a "drain" unless it comes within the words in sect. 250 of the Act of 1855, "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and this we contend it does not. In the first place we say that there was no order. An order is made to bind a person to do something. Here there was no intention to bind the owner of the property to make a drain, the board merely expressed its approval of what he proposed to do, and no order was necessary. He was not bound to build at all, and was not bound to drain unless he built. Under the Act of 1855 sewers had to be constructed by the board itself, but the Act of 1862, sect. 44, authorizes the making them by the owners of the land with the consent and subject to the directions of the board. This, therefore, though made by the owners may be a "sewer." The only places in which a "combined operation" is referred to by the Act of 1855 are sects. 74 and 250, the latter section therefore must, in using these words, be taken to refer to a combined operation under sect. 74. Now sect. 74 is supplemental to sect. 73, which relates only to existing houses, and the language of sect. 74 in itself shews that the section only relates to existing houses. There was therefore no jurisdiction to make an order for draining by a combined operation houses in course of construction. Sect. 76 does not authorize it, for that section contains no reference whatever to combined

(1) Law Rep. 9 C. P. 62.
(2) 6 H. & N. 72.
(3) Law Rep. 20 Eq. 626.
(4) 5 Ch. D. 347.

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drainage, it speaks only of "house or building;" and the general scheme of the Act is that each house should have its separate drain into the sewer, and that systems of drainage not confined to single houses should vest in the board: *Vestry of Marylebone* v. *Viret* (1). An exception is expressly introduced by sect. 74 in very definite terms, and the Court will not consider another to be introduced by general words in sect. 76 which are satisfied by applying them to each single house. This 9-inch pipe is, therefore, according to the definition in sect. 250, a "sewer," and is vested in the board, and they are the proper persons to be sued for nuisance arising from it. As to the 12-inch drain, it is not disputed that it is vested in them, and there is sufficient evidence of such nuisance as to warrant an injunction.

Napier Higgins, in reply.

1886. July 30. COTTON, L.J.:—

This is an appeal by the Defendants the Board of Works for the *Poplar* District, against an order of Mr. Justice *North*, by which he granted an injunction to restrain them from committing a nuisance in respect of the state of what I will call two drains. One was a drain in front of certain houses fronting *Wallis Road*, and it was undoubtedly a public sewer, and the only question about this drain was whether there was such evidence of nuisance as would justify the order for an injunction which has been made by Mr. Justice *North*, and which practically was a mandatory injunction.

The other drain ran at the back of those houses into *Windsor Road*, where it communicated with the metropolitan sewer. That drain ran at the back of the whole row of houses, and into it there entered what I will call house-drains, carrying into it the sewage of the respective houses, instead of its being carried out through the front into the sewer belonging to the Defendants. It was clear on the evidence that the state of this drain was such that if the Defendants were answerable for it—that is to say, if it was vested in them—the injunction was right. The first question, therefore, which I will consider is this—whether that

(1) 19 C. B. (N.S.) 424, 440.

drain running at the backs of the houses was one which was vested in the Defendants. That turns on the construction of the interpretation clause 250 of the *Metropolis Local Management Act* of 1855, and although a later Act was referred to, in my opinion that Act has no material bearing on the question which we have now to consider.

Sect. 250, so far as regards drains, says this: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage" (this drain at the back of the houses of course does not come within that), "or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid, applies." By sect. 68 all "sewers" except those vested in the Metropolitan Board of Works are vested in the local board.

Therefore, the question which we have to consider is whether this is a drain for draining any group or block of houses by a combined operation under the order of any vestry or district board. As far as we can ascertain, with the assistance of counsel and from what we have seen of the Act, there is only one previous section of the Act in which the expression "combined operation" appears, and we must look to that section for the purpose of seeing what "combined operation" means. Mr. Justice *North* thought that the reference there was simply to a combined operation under sect. 74, and held that that section, like the preceding section, only applied to houses already existing, and not to the drains to be made from houses which were in course of building, as was the case with these houses when this drain at the back was made.

Now for the present moment I am only considering that section for the purpose of deciding what "combined operation" means, and when we look at that section, in my opinion it means

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the construction of a drain which is to take away, not the sewage of one house only, but the sewage of several houses in combination—either a block of houses or several houses, and the statute is not looking at the combination of owners, but the combination of houses to be drained so as to have their refuse carried off into the main sewer. Sect. 74 enacts that "If it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist, or be about to be constructed within 100 feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved as hereinbefore provided, by a combined operation." Under the prescribed conditions the board may make an order under this section for the combined drainage of houses into the common sewer—houses in combination—instead of, under sect. 73, giving an order that a house not properly drained into the main sewer should have a separate fresh drain to carry off its refuse into the sewer. That, therefore, is the meaning, as I understand it, of a combined operation. If, however, this section were the only section under which the local board could order houses to be drained into the common sewer in combination, I should have agreed with Mr. Justice *North*, because, in my opinion, sect. 74 is a sort of annex to sect. 73, which only gives power to the local board to give directions as to how existing houses not properly drained into the common sewer are to be drained. Under sect. 73 it is to be done by ordering a sewer direct from each house into the common sewer. Under sect. 74 they may order several houses in combination to be drained, and it is material, I think, that sect. 74 recognises the fact that the draining of several houses in combination may not only be done more economically, which of course was a thing which the owners of existing houses would have to consider, but more advantageously, than by draining each house directly into the common sewer. I may state here that it is obvious that in many cases that may be so, because if there is to be a draining direct into the main sewer from each

house, that must be as a rule from the front of the house. The main sewers as a rule go down the public thoroughfares, and it is obvious that there may be many inconveniences arising from all the sewage of a house being carried through it or under it by means of drains, so as to be brought to the front, which would be obviated if the drainage could be carried out at the back near the place where it first originates, and never pass under the house at all.

But is there in any section of the Act any power given to the local board to direct that houses which are not built, but about to be built, shall be drained in combination? Sect. 74, I agree, does not apply. Sect. 75 is a prohibiting section. It prevents any house from being built without drains constructed to the satisfaction of the vestry or district board. Then we come to sect. 76, which gives power to the vestry or local board, after notice, to give directions as to the mode in which a new house is to be drained. Now it would be rather curious that power should be given to the local board to order that existing houses shall be drained in combination, but that there should be no such power as regards houses not yet built, when sect. 74 recognises the fact that houses may under certain circumstances be drained more advantageously by being drained in combination than by each house being drained by a separate drain into the common sewer.

But still, we must look at the Act and see whether such power has been given. We cannot make Acts of Parliament. Now, in my opinion it is given by sect. 76, which enacts that: "Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form, and of such materials and

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workmanship, and with such branches thereto, and other connected works and apparatus and water supply as hereinbefore mentioned, and as the vestry or board shall order."

I will stop there. Before the house is built application is to be made to the vestry or local board, saying what the proposed system of drains is, and if there are several houses as regards which there is to be an application to the board, and as regards which a direction or order is to be given by the board, in my opinion they may, if they think it more advantageous for the purpose of draining those houses, direct that they shall not be drained directly and separately into the common sewer, but that there should be a combination of the houses, and that there should be a drainage of the houses in combination, just as has been done here, by a drain running along the back of all the houses, receiving the refuse from all the houses, and not allowing it to pass under the houses and to be discharged in that way into the common sewer, but carrying it into the metropolitan sewer, which was accessible from the back. It may be (and I think it is so) that the Act contemplates, as a general rule, that each house should be drained separately, and that may in most cases be most advisable; but the question is whether there is not a power here in the local board to direct the contrary when in the special circumstances of the particular case they are satisfied that the drainage can thus be done more effectually or more economically. In my opinion there is such power.

Then we come to the question whether or not there has been an order of the district board that the drainage shall be done in combination. In my opinion there has. We had the book produced to us. The application was made, stating what was proposed to be done and how it was proposed to be done—stating the pipes, &c., and shewing on a plan how the drain was to go, and what communication there was to be between it and the houses. That was brought before the vestry, and in a book which was produced to us there was the signature of the chairman, shewing that the scheme had come under the consideration of the local board and that it had been approved. It is said that that was not an order. In my opinion there was an order. It is very true that that book and the signature do not constitute a

formal order such as would have to be made and served if it was necessary in any way to enforce it. But the existence of an order does not depend upon its being drawn up. The order of a Court is represented by that which is drawn up, but the order of a Court is made before anything is drawn up at all, and if any one, knowing of an injunction granted or an order made by the Court, were to disobey it, he would be sent to prison, though no order had been drawn up. Therefore, in my opinion, the local board having power to direct that these houses should be drained in combination as was proposed, and having approved of that, although no formal order was drawn up, have ordered and directed that these houses should be drained into the main sewer by means of this drain conveying the refuse of several houses in combination. It was suggested that an order means that which is to be enforced *in invitum*, and here there was only an assent to a proposal; but in many cases the Court is asked for an order really to assist and favour the wishes of all the parties who are before the Court, and in my opinion, if a thing is ordered, the order is not less an order because it is not to be enforced against any one at the time, because the persons applying for it and all other parties ask that the order may be made. Of course, if having got the order they depart from it, then it may have to be enforced against them; and here, if instead of making the drain in this way, the building owner had made a different drain into the main sewer, of course then, on the formal order being drawn up and duly served upon him, the board could put in force against him any powers which they have over those who disregard their orders. In my opinion, therefore, this drain at the back of the houses leading into one of the main metropolitan sewers was a drain within the definition of sect. 250, and not a sewer, and therefore was not vested in the local board; and as regards that drain, in my opinion the injunction was wrong and must be discharged.

Then we come to the other and larger drain, which was undoubtedly a public sewer vested in the local board. The real complaint about that was this—that there was a gully just on the opposite side of the road from one of these houses which was very offensive. There was a great conflict of evidence as to what really

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caused the offensive smell. The occupiers of some of the houses farthest removed from this gully complained the most, and the Defendants contended that the offensive smell was not caused by the gully. Now I should think (on the evidence) that it was caused partly by offensive manufactories near, and partly by effluvia from the sewer coming out through this gully, but that does not dispose of the question whether now on an interlocutory motion an injunction ought to be granted, which is, in fact, mandatory, because if the smell is to be entirely removed, the local board would probably have to rebuild and put in a different form not only this gully but probably many other gullies in their district. I give no opinion as to whether this is a satisfactory form or kind of gully. That will be dealt with at the hearing of the action. But I think that on this motion, the local board undertaking to keep this gully in proper order and properly supplied with such disinfectants as may be required, there ought not to be any such injunction as has been granted, even as regards this main sewer, but that the question whether this gully is of proper construction and sufficient to keep out the smells which arise in these particular places, ought to be left to be decided at the hearing, for we have not sufficient evidence before us to satisfy me that this was a form of gully which was not appropriate to this particular spot or to be used generally by the local board for their sewers. In my opinion therefore, on that undertaking being given by the local board, the injunction ought to be discharged, and the matter as to this gully in front of the houses will have to be dealt with at the hearing of the action.

LINDLEY, L.J.:—

This case is not by any means free from difficulty. It turns upon a careful examination of the *Metropolis Local Management Act* of 1855, which contains 251 sections, and of the *Metropolis Local Management Amendment Act*, 1862, which contains more than 100 sections. We have to read these two Acts together and apply them to the facts of the case before us.

Now with respect to the Act of 1862, I do not think, having read it carefully, that much turns upon it. It is not wholly immaterial, because proceedings, as I understand, were to a certain

extent taken under it; but the real difficulty arises on the construction of the Act of 1855. Mr. Justice *North* granted an injunction restraining the local board from permitting smells to emanate from a 9-inch pipe which is at the back of the houses and from a 12-inch sewer which was in front. As regards the 12-inch sewer in front, it is admitted on all hands that it is a sewer as distinguished from a drain, and is the property of the local board, and as regards it the only question was whether there was or was not any nuisance emanating from the gullies of that sewer. As to that I concur in the observations made by Lord Justice *Cotton*, and I do not propose to say anything more upon it.

The real difficulty arises with respect to the 9-inch pipe at the back, and the question there is reduced to this—whether that 9-inch pipe is a sewer vested in the local board, or whether it is a drain with which they have nothing to do and for which they are not responsible. With reference to that, the case turns, as I said before, upon the provisions of the *Metropolis Local Management Act* of 1855, and in particular upon sect. 250, which is the definition clause, and upon a group of sections commencing at sect. 68 and ending with sect. 76. The 250th clause says, that a drain shall mean, amongst other things, "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." On looking into the Act, the only place where we find an expression in any way similar to this is at the end of the 74th section, which enacts that under certain circumstances "it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved as hereinbefore provided by a combined operation." That is the only place in the Act, so far as I can see, where that expression is used, and it is quite obvious that sect. 250 applies to a drain made under an order as contemplated and provided by sect. 74. The question really is whether the expression "drain," in sect. 250, is confined to that which is made under sect. 74. For that purpose we must look a little closely into the sections, and it appears to me that if we take the group of sections from sect. 68 to sect. 76, they are divisable primarily into two clauses. First of all we have sects. 68, 69, 71 and 72 relating to sewers as distinguished from drains. The next subdivision, sects. 73 to 76 inclusive,

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relates to drains as distinguished from sewers, and these four sections are again subdivisible. Sects. 73 and 74 relate to drains of existing houses, and sects. 75 and 76 relate to new houses and the drains thereof. Now, bearing that in mind, we must proceed to inquire what was done, and certainly one is a little disinclined to hold, that that which everybody intended to do has not been done. One is always desirous, if possible, to give effect to the reasonable intentions of parties, and not to defeat them. One thing is manifest beyond all controversy. When this 9-inch pipe was made, when the application was made to the Defendants to sanction it, and when they did sanction it, everybody supposed that what was intended to be made and approved was a 9-inch drain, not a sewer. The whole of the documents make that plain enough. It does not follow that they have not done that which they did not intend to do. It does not necessarily follow that although they all thought they were making a 9-inch drain and not a sewer, they did not in fact make a sewer with all the consequences which flow from it, but one is reluctant to come to that conclusion. I quite agree in the construction put by Mr. Justice *North* upon sects. 73 and 74—that those two sections by themselves apply only to existing houses. I think that is tolerably plain when you come to scan the language carefully. But that does not solve the difficulty. The question which really arises turns upon the true construction of sect. 76, and the question which we have to consider is whether the language of sect. 76 does not apply to such an application as was made, and to such works as were done under that application with the approval of the board.

Now sect. 76 appears to me to include that which was done. It is very true that there are only general words in sect. 76. It is very true that you do not find in sect. 76 any such expression as an order for draining a group or block of houses by a combined operation. But it appears to me you do find there general words which are perfectly capable of including such a combined operation. Sect. 76 is a little long, but I will read it. Sect. 75 prohibits new buildings being erected without proper drains, and so on. That is a prohibitory section. That is followed by sect. 76: "Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild

any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned, and as the vestry or board shall order, and the making of every such drain shall be under the survey and control of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice." Now when we come to spell that out, it appears that when new buildings are being erected the vestry can give directions and make orders about drains, and the drains are to be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned, the "hereinbefore mentioned" occurring once in the section, but being applicable to every branch of the clause which really terminates with it. That throws us back, it appears to me, with reference to new houses upon sect. 73 and sect. 74. I see no reason at all for holding, and I do not think it would be a correct construction to hold, that it throws us back upon sect. 73 alone. It seems to me to throw us back upon both sections, and I think therefore that if the board is asked to sanction the making of one drain for a group of houses by what is called a combined operation, they have ample powers of doing it under sect. 76; and indeed it would be remarkable if it were otherwise, because if they could do it under sect. 74 when the houses were up, it seems *à fortiori* that they could do it before the houses were up, and sanction that which they could afterwards order to be done.

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Having come to the conclusion, therefore, that the order, if there was an order, was one which the board could make under sect. 76, the next inquiry is whether what was done amounted to an order. Now, when we look at what was done, it would be strange to hold that the sanction given by them was not an order. It was an order by consent, it is true, but none the less an order. An application was made by the person about to build or erect these houses for the approval, or sanction, or order—call it what you like—of the board, authorizing him to do it. He could not do it unless the local authority approved his plan as sent in, but they did approve it, and they made an entry in their book. Now, that appears to me to be in substance an order—an order made by consent. It is true it is not formally drawn up, but we all know that there are a vast number of orders made every day in various Courts which are never drawn up at all. The order consists in the direction of the Court that something shall be done, and a minute is made, but the order is not drawn up unless it is wanted for the purpose of being enforced, or for the purpose of appeal. It appears to me that what we have got here is in substance and effect an order by consent never drawn up, but capable of being drawn up at any time, if necessary, either for the purpose of enforcing it or for the purpose of appealing against it. But, of course, a person who has consented to it cannot appeal against it; still that does not affect the question whether it is an order or something short of an order.

Under those circumstances I am compelled to dissent from the view taken by Mr. Justice *North* of the true construction of this section. It appears to me that this 9-inch pipe at the back is not a sewer vested in the Defendants, but is what everybody supposed it would be—a drain belonging to the person who made it. The drain is not made by the local authority under any section which authorizes them to make it. It is made by the building owner. It is his drain, and he is responsible for it. It appears to me, therefore, that the appeal ought to be allowed.

LOPES, L.J.:—

As I differ from the rest of the Court on the construction of the Act of Parliament, I feel bound to give my reasons at some length, and have committed my judgment to writing.

This is a motion for an injunction to restrain the Defendants from allowing offensive smells to issue from their sewers and drains. *Bateman* is the owner of all the fifteen houses, and the other Plaintiff, *Meckiff*, is occupier of one of the fifteen houses in a row within the district of the Defendants. There are two sewers or drains which are complained of, one called the 12-inch, which runs along the *Wallis Road*—the road upon which the fronts of these houses look—and the other called the 9-inch, which is the means by which these fifteen houses are drained, running along the back of the houses, passing to the road called *Windsor Road*, where it runs into a sewer belonging not to the *Poplar* Board of Works, but to the Metropolitan Board of Works. It is the offensive smell issuing from these two drains or sewers which is complained of.

Three questions arise:—First: Whether a notice of action is necessary? Secondly: Is what I will call the 9-inch a drain or a sewer? Thirdly: Is there, as a matter of fact, a substantial nuisance from the 12-inch and 9-inch, or either of them?

With regard to the first question, it is clear that the 106th section of the *Metropolis Local Management Amendment Act*, 1862, which is relied on, has no application to an action for an injunction to restrain a nuisance. *Flower* v. *Local Board of Low Leyton* (1) is in point, and a conclusive authority.

With regard to the third question, I am of opinion that there was evidence before the learned Judge below to justify him in finding that there was a substantial nuisance both from the 9-inch and 12-inch, but I concur with what has been said on this part of the case by the Lord Justice *Cotton*.

So far I agree, but on the second question, which raises a most important point of law on the construction of the *Metropolis Local Management Act*, 1855, I regret to say I differ from the judgments that have been delivered.

The question is whether the 9-inch behind the houses is a drain or a sewer. If it is a sewer, it is vested in the Defendants under the concluding words of the 68th section of the Act. If it is not a sewer but a drain, then the Defendants are not responsible for its state, and the Plaintiffs' case fails. Whether

(1) 5 Ch. D. 347.

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it is a drain or a sewer depends upon the construction of the Act.

It will be convenient first to see how "drain" and "sewer" are respectively defined in the interpretation clause, sect. 250. That section says, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." Up to this point one building only is contemplated, and any drain used in respect of more than one building is not a drain within the definition. The definition proceeds—"and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." I think the scheme of the Legislature is disclosed here, namely, that every house should have a separate drain, and if it had not, the drain should be a sewer, and become vested in a public body; but, in the case of groups or blocks of houses already existing, permitting the board to order drainage by a combined operation. In my opinion, the latter part of the definition refers to sect. 74, and to that section only. It is to be observed that the only occasions where the words "by a combined operation" occur are in the interpretation clause, and in sect. 74. The fifteen houses in question are in course of construction, and are drained by a 9-inch sewer or drain at the back, to which the pipes are carried from each of the fifteen houses. The drainage of each house, so far as the main drain or sewer, is distinct, but this drain or sewer is the common means by which the fifteen houses are drained, and through the lower part of which all the drainage from these fifteen houses reaches the main sewer. The 9-inch is not, therefore, a drain, draining one house or premises within the same curtilage. That being so, it is a sewer within the meaning of the Act, unless it is covered by the last words of the definition, namely, "Any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board."

We must now turn to the body of the Act. At the 67th

section commences that portion of the Act which relates to the duties and powers of vestries and district boards. The 68th section, in its final words, as I have already pointed out, vests all sewers made or to be made within a district in the vestry or board respectively. The 69th, 70th, 71st, and 72nd sections are not material.

Then comes the 73rd section, which it is most important to consider. It relates to the insufficient drainage of individual houses, whether built before or after the commencement of the Act, and enables the vestry or board, by notice in writing, to require the owner to construct a covered drain into the sewer in the manner therein provided; authorizes an inspection during progress, and provides, in case of default by the owner, that the vestry or board may do the work themselves, and recover the expenses from the owner. The Legislature therein provides for the insufficient drainage of separate existing houses. Most clearly this section relates to existing houses only, and not to houses in course of construction. The latter are provided for, as we shall see presently, by sect. 76.

Then we come to sect. 74, which has been already read. I think this section is supplemental to sect. 73. It is intended to apply to deficient drainage in existing groups or blocks of contiguous houses, not separate, as in sect. 73, but side by side. It may be these houses belong to different owners, and the vestry or board are enabled to do that which they could not have done under sect. 73 alone, namely, by a notice to require the owners to combine to do what is required. I adopt the words of Mr. Justice *North* here, where he says, "if it had not been for the 74th section, all that could have been done would have been to give notice to each of the owners of the different houses, and require each of those owners to drain his house in the way required by the board, but the 74th section points out what is obvious—that there may be a group of houses or adjacent detached or semi-detached houses which may be drained or improved more economically and advantageously in combination than separately. More economically and advantageously to whom? Why to the person who has to pay for it, and who has got to do it, and who can be required by notice to do it. Therefore, what this contem-

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plates is a combination which may have the result of producing economy and advantage to the persons who have to do it, that is to say, to the owners to whom notice is to be given under sect. 73."

If the notice given requiring the different owners to combine was not complied with, the same consequences would ensue as under sect. 73, namely, the board or vestry would do it themselves, and charge the owners with the expenses. This in my opinion is the kind of order that is referred to in the interpretation clause, when it says "a combined operation under the order of any vestry or board"—a very different thing from that relied on here, which is at the most an approval only. In my opinion, the Legislature intended that at the 74th section all the provisions with regard to defective drainage in existing houses, whether separate or side by side, should end, and did not intend that drainage by a combined operation should have any place in the provisions subsequently made for houses thereafter to be constructed. Sect. 75 applies entirely to houses to be erected or to be rebuilt, and provides that they shall not be erected or rebuilt without drains constructed to the satisfaction of the board. Nothing is said about groups, or blocks of contiguous houses, and drainage by a combined operation.

Now I come to the 76th section, which is the section relied upon. It states what is to be done before beginning to lay the foundation of a new house. Seven days' notice is to be given. Every foundation is to be laid as therein provided. Every drain is to be made in such direction, manner and form, and of such materials and workmanship, and with such branches thereto, and other connected works and apparatus and water supply "as hereinbefore mentioned," and as the vestry or board shall order. In default of notice, or in case of non-compliance, the board or vestry may demolish or alter, &c., and charge the expenses to the owners. There is nothing in this section about groups or blocks of contiguous houses, and nothing about drainage by combined operation. The section in express terms refers to single houses and single drains. It is suggested that the words "hereinbefore mentioned" have the effect of incorporating sect. 74, and of making sect. 76 applicable to the state of things contemplated

by sect. 74. "Hereinbefore mentioned," in my opinion, refers to the latter part of sect. 73, and to that only. If it was intended to refer to and incorporate sect. 74, it would be only reasonable to suppose that sect. 76 would not only speak of a new house, but would refer to groups and blocks of contiguous houses and to drains by a combined operation. There is, however, no mention of any kind of groups or blocks of houses, or drainage by combined operation. I cannot think such important provisions were intended to be introduced into sect. 76 by the words "hereinbefore mentioned," more especially when I find sect. 76 dealing only with separate houses and separate drains. It may be said: "Why should the Legislature, in the case of existing houses imperfectly drained, allow drainage by combined operation, and not permit it in houses about to be constructed?" I believe the Legislature thought it was best for each house to have a separate drain, but in the case of existing houses thought it harsh to take the property in the drains away from the owners of contiguous houses without first giving them an opportunity of draining by combined operation, if it was for their advantage so to do. Owners of several houses under no liability to improve their drainage, might, by a board making a sewer close by and then giving notice, be compelled to improve their drainage. The Legislature, in my opinion, seems to have thought that in such a case it would be unjust to have taken the drains already existing out of them and vest them in the board. On the other hand, when a man is about to build, he can make his proposal, and if the board do not assent he is not bound to build. Again, if an owner, building new houses, makes a drain to drain several houses, he knows it becomes a sewer and vests in the board, and has nothing to complain of.

For these reasons I think the 9-inch is a sewer, and as such, is, by the 68th section of the Act, vested in the board. I think, therefore, that Mr. Justice *North* was right, and that the appeal should be dismissed.

Solicitor for Plaintiffs: *Edward Clarke.*
Solicitor for Defendants: *A. R. Oldman.*

H. C. J.

C. A.
1886
July 31.

In re JAMES'S TRADE-MARK. JAMES *v.* SOULBY.

[1885 J. 1112.]

Trade-mark—"Distinctive Mark"—Trade Marks Registration Act, 1875, *s.* 10.

In 1861 the Plaintiffs registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end. From that time they sold black lead in boxes upon which a black dome was impressed, and they imprinted a dome upon each block of black lead. This they did without regard to the shape of the blocks they sold, and there was evidence that the term "dome black lead" had become known in the trade as denoting black lead of the Plaintiffs' manufacture. In 1877 they registered a black dome as their trade-mark for "black lead." The Plaintiffs having brought an action to restrain infringement of their trade-mark the Defendants applied to have it expunged from the register, and Mr. Justice *Pearson* ordered it to be expunged on the ground that it was only a representation of the thing sold, which thing everybody was at liberty to make, and therefore was not a good trade-mark:—

Held, on appeal, that there was no reason why a dome should not be a distinctive mark for black lead, that the evidence shewed it to be in fact distinctive, that it was therefore capable of registration as a trade-mark, and that the decision of Mr. Justice *Pearson* must be reversed.

THIS was an appeal from a decision of Mr. Justice *Pearson* (1).

The Plaintiffs, in 1861, registered under the Act of 6 & 7 Vict. c. 65, a design for the shape of blocks of black lead. The design consisted of a cylinder terminating in a dome at the upper end. From the year 1862 the Plaintiffs were in the habit of selling black lead in boxes, upon which they printed a black dome, and there was evidence that the name "dome black lead" had, before 1875, become well known in the trade, and was understood to denote black lead of the Plaintiffs' manufacture, and that on two occasions during that period the Plaintiffs had remonstrated with manufacturers for putting a dome on their black lead, and that the doing so had been discontinued. The Plaintiffs used the dome as their mark upon all the black lead they sold, whether it was in the dome form or in cylinders or square blocks. They used it in their labels and impressed it on each block of their

(1) 31 Ch. D. 340.

black lead. In 1877 the Plaintiffs registered the figure of a black dome as their trade-mark for "black lead." The present action was commenced in 1885 to restrain the Defendants, who traded under the firm of *M. J. Perry & Co.*, from infringing the trade-mark. The Defendants applied to rectify the register by expunging the trade-mark, and the application came on with the trial of the action. Mr. Justice *Pearson* ordered the trade-mark to be expunged and dismissed the action. The Plaintiffs appealed. The Defendants, who had given up the black lead business, were served with notice of appeal but did not appear.

Sir *R. Webster*, A.G., *Cozens-Hardy*, Q.C., and *Carpmael*, for the Appellants:—

The Defendants have given up the business, so we do not care for an injunction against them, but it is important for us to have it decided whether ours is not a good trade-mark. The question is whether it does not come within the words in the *Trade Marks Registration Act*, 1875, s. 10: "A distinctive device, mark, heading, label, or ticket." Why should a dome applied to black lead not be a distinctive mark? Mr. Justice *Pearson* says it is nothing but a representation of the article sold, and comes within the mischief of the attempt to use as a trade-mark words which merely describe the article. Now it is not the fact that this mark is simply a representation of the article sold:—it only may be so in some cases, for we use it for all black lead, whether dome-shaped or not. Moreover, we contend that a representation of the article sold is not necessarily bad as a trade-mark—it must be determined by the circumstances of each particular case whether it is so. No doubt a gun would not be a good trade-mark for guns, or a razor for razors—for it would be a likeness of every article of the kind, there would be nothing distinctive in it. The American cases to which Mr. Justice *Pearson* refers are to be found collected in *Sebastian* on Trade-marks (1), and they go such a length that they cannot be treated as of any great weight, especially as we do not know the enactments on which they are founded. This would have been a good trade-mark before the Act of 1875, and it was not the intention of the Act to take away any existing

(1) 2nd Ed. p. 39.

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trade-mark. This would be a good trade-mark for an entirely different class of goods, and the mere fact that black lead is sometimes made dome-shaped cannot make it bad for black lead. Suppose we had used *Bass's* triangle, surely that would have been a good trade-mark, though people might make black lead in triangular blocks.

COTTON, L.J.:—

The only question which we have to decide is, whether Mr. Justice *Pearson* was right in saying that a black dome could not be registered under the Act as a trade-mark for black lead. The Appellants cannot claim any monopoly in the shape in which they sell their black lead, nor do they by registering the mark claim any such monopoly, for they do not register a shape so as to claim the sole right of selling black lead in that shape, but what they claim is the right to use this dome as a trade-mark on their black lead in whatever shape they sell it. No doubt there are circumstances leading somewhat to the supposition that the Plaintiffs are using this trade-mark as a means of protecting their shape, and that they cannot do. But supposing this to be a trade-mark which they annex to black lead in whatever shape they sell it, there is, in my opinion, nothing to prevent its being registered under the Act as a trade-mark. What the Act requires is a distinctive device, mark, heading, label, or ticket, and this is a mark. Is it distinctive? I think it is. It is one which the Plaintiffs have throughout, from 1861 downwards, used as a mark annexed to their black lead, and it would be a distinctive mark even though they sold their black lead in a different shape, such as in a cake or a cylinder, without any dome at the top of it. I think Mr. Justice *Pearson* did not sufficiently regard this. He considered this as if it was an attempt to register as a trade-mark a picture of the thing sold. But that is not so. It is very true that the Plaintiffs sell their black lead in the shape of a dome, but they also sell it in other shapes, and on the bottom of each piece of black lead which they sell they impress as their trade-mark the figure of a dome. They have done what, perhaps, is unfortunate, they have put "registered shape" at the bottom of the blocks. That is wrong. It is not the shape that is registered

but it is the mark as distinctive of their black lead in whatever shape it is sold which is registered; and I think that on the true construction of the 10th section it can be registered as a trade-mark. In my opinion, therefore, this appeal must succeed.

As regards the American cases referred to we, of course, should pay regard to the opinions expressed by Judges of distinction in the *United States*, but their decisions do not in any way bind us, and, moreover, the terms of the Acts with which they were dealing may have been utterly unlike those of the Act before us. In my opinion, therefore, those cases do not give us any assistance as regards the question we have to decide. The Appellants have no exclusive right to this shape; but, in my opinion, they are entitled to have the dome registered as their trade-mark to be affixed to their black lead in whatever shape they sell it.

LINDLEY, L.J.:—

I am of the same opinion. We must be careful to avoid confusion of ideas. A mark must be something distinct from the thing marked. The thing itself cannot be a mark of itself, but here we have got the thing and we have got a mark on the thing, and the question is, whether that mark on the thing is or is not a distinctive mark within the meaning of the Act. Of course the Plaintiffs in this case have no monopoly in black lead of this shape. Anybody may make black lead of this shape provided he does not mark it as the Plaintiffs mark theirs, and provided he does not pass it off as the Plaintiffs' black lead. There is no monopoly in the shape, and I cannot help thinking that that has not been sufficiently kept in mind. What the Plaintiffs have registered is a brand, a mark like a dome intended to represent a dome. Is that a distinctive mark? There may be marks not sufficiently distinctive to come within the statute, but I cannot conceive why a mark such as we have here should not be a distinctive mark, and as a matter of fact the evidence shews that it is a distinctive mark. Why, then, should not the Plaintiffs put it on their labels, and why should not they put it on the things they make? Supposing they chose, as for aught I know they may choose, to sell black lead of this description in cubes or spheres, or in octagonal or other shapes, there is no reason why

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they should not mark them with this mark of a dome. If they do I cannot see that there is anything contrary to the Act in their claiming the benefit of that registered dome-mark. It appears to me that Mr. Justice *Pearson's* decision in this case cannot be supported.

As regards the American decisions, I quite concur in the observations made by Lord Justice *Cotton*. I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pig-skin into leather, I do not know why a pig should not be a good trade-mark for tanned pig's hide. I am not inclined to apply to English Acts of Parliament the American cases which have been cited. I am not acquainted with the American Acts under which they were decided, and I have not found the American definition, if there be one, of a trade-mark.

LOPES, L.J.:—

The question in this case is, whether this device or mark which I find at the bottom of this block of black lead is capable of appropriation and capable of being registered. In order to be capable of being properly registered it must be a distinctive device or mark not in common use. I suppose it cannot be for one moment said that what I find at the bottom of this block is not a mark. I very much doubt if it could be possibly said that it is not a device. Then is it a distinctive device or mark? The meaning of the word "distinctive" I understand to be this, that it must be a mark or device of such a kind that in case of infringement it shall be clear what it is that is being infringed, and that the mark is something different from all other marks used in the same class of goods. The evidence in the case leads me to the conclusion that this mark is distinctive. But then it is said that it cannot be registered because it is a pictorial representation of the thing itself. The answer to that appears to me to be this, if this block instead of being in the shape of a dome

had been in the shape of a cube it could not have been disputed that this device or mark which I find at the bottom of it would be sufficient. I can only say I am at a loss to understand why if it would be sufficient in the case which I have mentioned it is insufficient in the present. Why is it the less a distinctive device or mark because it represents the thing upon which it appears?

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With regard to the American authorities, I make only one observation. They appear to me to be of very little value, and to afford us very little assistance in deciding this case, as we have not before us the enactments under which the questions arose. I agree, therefore, in the view that the decision of the learned Judge below was wrong.

Solicitors: *Wilson, Bristows, & Carpmael.*

H. C. J.

CADMAN *v.* CADMAN.

C. A. 1886 *Aug.* 4.

[1886 C. 1307.]

Infant—Maintenance—Charge on Infant's Estate in Remainder.

Five infants were entitled to successive estates tail in real estate after the death of their grandmother, who was tenant for life. There being no income applicable for the maintenance of the infants, an application was made in an action on their behalf, that a sum of money for past maintenance and certain annual sums for future maintenance should be raised on the security of a charge on the estate; the tenant for life being willing to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession, and to join in the necessary deeds:—

Held, that such an order could not be made.

In re Howarth (1) distinguished and doubted.

UNDER the will of *William Carr*, dated the 7th of June, 1862, certain freehold estates in *Yorkshire*, producing about £4000 a year, were limited in the events that happened to the use of *Margaret Cadman* for life, with remainder to her grandchildren, *P. S. Cadman, C. C. Cadman, W. C. Cadman, E. C. Cadman,* and *G. H. Cadman* successively in tail male, all of whom were infants

(1) Law Rep. 8 Ch. 415.

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living with their mother, *Alice Cadman*, who had an income of about £300 a year.

The present action was brought by *Margaret Cadman* and *P. S. Cadman*, the eldest of the infants, by *Alice Cadman*, his mother and next friend, against his brothers as Defendants, for the purpose of providing for the maintenance of the infants.

A summons was taken out in the Chambers of Mr. Justice *North*, asking the Judge to make an order to the following effect:—

That the sum of £1000 should be allowed for the past maintenance of the infant Plaintiff and the Defendants, and that the annual sum of £800 should be allowed for their future maintenance and education; and as it appeared that the Plaintiff *Margaret Cadman* was willing to relinquish so much out of the rents and income of the settled estates payable to her as tenant for life as would be equivalent to 4 per cent. per annum upon the sums to be raised under the order, and to execute the necessary deeds as protector of the settlement, that *Alice Cadman* should be directed to raise upon the security of the settled estate the sum of £1000 for the past maintenance and education of the infant Plaintiff and Defendants; and that the said *Alice Cadman* should in like manner from time to time raise the annual sum of £800 for the future maintenance and education of the infant Plaintiff and Defendants; and that the Plaintiff *Margaret Cadman* should out of the rents of the settled estates pay an amount equal to £4 per cent. per annum upon the shares from time to time charged on the estates.

Mr. Justice *North*, sitting in Chambers, refused to make the order applied for, and an appeal was brought from his decision by all parties without its being further heard before him in Court.

It was at first proposed to effect a policy of insurance on the lives of the infants against the life of their grandmother, and to provide by the order for the payment of the premiums; but that intention was abandoned on the appeal; and the tenant for life also offered, instead of providing for the payment of interest on the sums charged, to release her life estate in one-twentieth of the property to the first tenant in tail, in order that he might have an estate in possession in that portion.

Cozens-Hardy, Q.C., and *Abraham*, for all parties:—

The Judge refused to make the order on the authority of *In re Hamilton* (1). But the principal ground of that decision was that the estate was in remainder, and that the Court was asked to provide for the premiums of life insurance. In the present case the tenant for life has consented to give up her life estate in a portion of the property, so that no difficulty arises from the estate being in remainder, and the proposal for a life insurance has been abandoned. The case comes within the principle of *In re Howarth* (2). All the infants being successive tenants in tail have an interest in the land. The mother might get judgment against them for necessaries supplied to them, and therefore this Court may reasonably charge the amount on their interest. Or if the first tenant in tail is to be considered solely entitled it is reasonable that the amount spent on the maintenance of his brothers should be charged on his estate, for he stands *in loco parentis* towards them, and it is for his benefit that they should be brought up properly: *Petre* v. *Petre* (3); *Wellesley* v. *Duke of Beaufort* (4); *Fentiman* v. *Fentiman* (5); *In re Allen* (6). If the Court will not make an order as prayed, we ask, at all events, for a charge for what has been expended in the past maintenance of the eldest son.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North*; and if we could act from motives of charity or benevolence, disregarding the law, it might possibly be very right to accede to this application. But we cannot do that. We have only to administer the law, and in my opinion Mr. Justice *North* was quite right in coming to the conclusion that by law he had no power to do what was desired. These five infants have nothing practically in possession, but they have large interests in reversion expectant on the death of their grandmother. Mr. Justice *North* was asked to charge the estates in remainder with £800 a year for the future maintenance of the infants, which he refused to do; and in order

(1) 31 Ch. D. 291.
(2) Law Rep. 8 Ch. 415.
(3) 3 Atk. 511.
(4) 2 Russ. 1.
(5) 13 Sim. 171.
(6) Law Rep. 8 Ch. 417, n.

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to cure the difficulty that the reversion could not be touched by a judgment—in order to enable that to be done—the grandmother is now willing to release her interest in part of the estate which will produce about £200 a year; so that the charge may be made on that portion. In my opinion that cannot be done. The case which has been relied on is *In re Howarth* (1), which is said to establish this, that where a judgment could be obtained against an infant for necessaries, this Court has jurisdiction to charge the estate of that infant with the amount which was to be recovered in the action. In that case the estate was an estate in possession, and the whole foundation of that case fails unless there is an estate in possession. We have in this case no reason to suppose that the grandmother would release the £200 a year unless the £800 a year was raised to provide for the maintenance, not only of the first, but the other children; and, in my opinion, it would be idle to suppose that, if properly directed, a jury could be found to give a verdict against an infant for necessaries supplied not only to himself but to his brothers. It is quite true when the Court of Chancery has money in hand and is making a provision for the eldest son of a family by way of maintenance, it considers besides the infant all those children who live with him, and for whom his position makes it necessary that provision should be made. But here the question is for what could a judgment be obtained against an infant for necessaries. And it must be remembered that this £800 a year is for his maintenance *in futuro*, and it would be impossible for any one advancing money for the maintenance *in futuro* of the infant to get judgment for the amount so advanced.

Then we are asked to allow a charge to be made for the past maintenance of the first tenant in tail or the person who might come into possession of this portion of the estate which is said to be worth £200 a year. But, in my opinion, it is not right to assume that where a mother has provided necessaries for her children, she has acted under such circumstances that the law will imply a contract on the part of the infant so as to make the mother a creditor of the infant. That is quite contrary to the ordinary course of dealing between a mother and an infant child.

(1) Law Rep. 8 Ch. 415.

I do not think *In re Howarth* (1) applies to the present case. But I must not be considered as acceding to the view which the Judges took in that case. I do not see what authority the Court had in that case, and I do not see what authority the Court would have in this case, even if there were a claim on the part of the mother to make such an order as was there made, effectually to charge the freehold estate.

LINDLEY, L.J.:—

I am of the same opinion. I am sorry we cannot make the order which is asked for or some similar order, but it is quite impossible to do it according to law. Our business is to administer the law. In the case of *In re Hamilton* (2) we tried whether we could get over similar difficulties but we found them insuperable; and I think still they are insuperable. *In re Howarth* went to the very verge of the law, and perhaps beyond it; but this must be borne in mind, that there the application was for an infant with an estate in possession and was for past maintenance only, and the case rested on a theory which is open to some difficulty in its application. This case goes far beyond that, and *In re Howarth* does not govern it.

LOPES, L.J.:—

I am quite clear that we cannot assist these infants. The case of *In re Howarth*, which has been cited, to say the least of it, carried things as far as they possibly could be carried, and, speaking for myself, I do not think I should have arrived at the conclusion arrived at in that case. But assuming that to be good law, there is a vast distinction between that case and the present. In the case of *In re Howarth* the infant was entitled to a fee simple in possession; there was only one infant; the application was in respect of past maintenance; and the Court thought that inasmuch as an action might be brought against the infant for necessaries, the Court might charge the property for maintenance. That was assuming that the action would lie and the judgment would be recovered, but, as I have already

(1) Law Rep. 8 Ch. 415. (2) 31 Ch. D. 291.

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said, I should have hesitated long before I arrived at the conclusion arrived at in that case. But observe the distinction between that case and the present. Here the estate is an entailed estate; here there are five infants, the eldest of whom is tenant in tail, who, if he attains twenty-one, on the death of his grandmother who, I suppose, is the protector of the settlement, can bar the estate tail and become absolutely entitled. What are we asked to do? We are asked to supply maintenance for these five infants. I can only say that in my opinion it is only necessary to state the circumstances of the case to see how impossible it is for the Court to grant the application. I think the decision of the Court below was perfectly right.

Solicitors: *Ridsdale & Son.*

M. W.

C. A. 1886 Aug. 6.

In re VERNON, EWENS, & CO.

Trustee and Cestui que Trust—Solicitor and Client—Money left in Hands of Solicitor for Investment—Mortgage—Outstanding Legal Estate—Conflicting Equities—Priority—Negligence—Purchaser for Value without Notice.

A client left moneys for investment in the hands of his solicitors.

The solicitors represented that the sum of £11,000, part of these moneys, was invested on mortgage of freehold property at *A.*, belonging to a firm, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for £55,000 upon property *X.* at *A.*, belonging to the firm, and they repaid themselves £11,000 of the £55,000 with the client's money.

The firm afterwards bought property *Y.* at *A.*, and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of £55,000 on property *X.*, and took from them a mortgage for £50,000 on properties *X.* and *Y.*, subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client:—

Held, first, that the solicitors must be treated as having become trustees for the client of £11,000 out of the £55,000 secured by mortgage on property *X.*; and having improperly as against the client given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for £11,000 and interest upon property *Y.* (in which the legal estate was outstanding) as well as upon property *X.*:

Held, secondly, that there had been under the circumstances no such

negligence or want of prudence on the part of the client as to postpone him, and that he was entitled in priority to the limited company to a charge on property *Y.* in which the legal estate was outstanding.

The decision of *Bacon*, V.C., affirmed.

Waldron v. *Sloper* (1) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (2).

The facts and arguments in the case are fully given in the report of the hearing in the Court below, and the following short statement of the material facts will, together with those referred to by their Lordships, be sufficient for the purpose of this report.

William Lamplugh Hervey employed Messrs. *F. S. & W. S. Parker*, of *Bedford Row*, as his solicitors, and was in the habit of leaving moneys of his in their hands for investment on mortgage and other securities for his benefit.

In 1878 Messrs. *Parker*, who had lent £55,000 of their own to Messrs. *T. Vernon & P. Ewens*, a firm of engineers and iron founders, upon mortgage in fee of one acre of freehold land near *Cheltenham*, and certain foundry works thereon, repaid themselves £11,000, part of the mortgage debt, out of moneys in their hands belonging to *Hervey*, and entered the transaction in their books as a "loan by *Hervey* to Messrs. *Vernon & Ewens* of £11,000 at 5 per cent.;" the interest being paid by Messrs. *Parker* to *Hervey* during his life.

In 1879 *Hervey* died intestate, and Messrs. *Parkers* continued to act as solicitors to his administratrix. In that capacity they prepared and passed on the 9th of July, 1880, her residuary account, which contained a statement that a principal sum of £11,000 with interest at 5 per cent was owing to *Hervey* from *Vernon & Ewens* upon the security of freehold property at *Cheltenham*, and they subsequently furnished her with a cash account containing entries of payments of interest "on £11,000 due from Messrs. *Vernon & Ewens*," and made similar statements to her both verbally and in writing.

In 1881 Messrs. *Vernon & Ewens* purchased a plot of freehold land 3A. 0R. 8P. in extent, adjoining their works, and executed a mortgage in fee of such plot, which was subsequently transferred to the *Worcester Bank*.

(1) 1 Drew. 193. (2) 32 Ch. D. 165.

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In 1882 one *Davis*, under an arrangement negotiated and carried out by Messrs. *Parker*, became a partner in the firm of *Vernon & Ewens*, and purchased and, on the 9th of October, 1882, took a conveyance of all the partnership property, undertaking to pay the partnership debts, and granting a lease of the works to the new firm. He shortly afterwards, on the 12th of October, mortgaged all the partnership property, including both the one acre and the 3A. 0R. 8P., to Messrs. *Parker* (subject as to the 3A. 0R. 8P. to the mortgage transferred to the *Worcester Bank*) in fee to secure £50,000 and interest.

Davis afterwards retired from his partnership with Messrs. *Vernon & Ewens*, and on the 7th of February, 1883, he conveyed his equity of redemption in the property comprised in the mortgage of the 12th of October, 1882, to the Messrs. *Parker*, who released him from the mortgage debt of £50,000 and interest. In July, 1883, as the result of a scheme arranged by the Messrs. *Parker*, the firm of *Vernon & Ewens* was converted into a limited company, and registered on the 19th of July under the name of "*Vernon, Ewens, & Co., Limited.*" On the 10th of December, 1883, by an indenture made between the Messrs. *Parker* of the first part, Messrs. *Vernon & Ewens* of the second part, and *Vernon, Ewens, & Co., Limited*, of the third part, in consideration of £50,000 payable to the Messrs. *Parker* and of £20,000 payable to *Vernon & Ewens*, to be satisfied by the allotment in the one case of 5000 fully paid-up shares, and in the other case of 2000 fully paid-up shares of £10 each, the Messrs. *Parker* and *Vernon & Ewens* conveyed to the limited company the freehold plots of 3A. 0R. 8P. and one acre, and the machinery and goodwill of the business, as to the freeholds in fee simple, subject to the mortgage vested in the *Worcester Bank*, and as to the machinery and goodwill absolutely.

Early in 1884 the Messrs. *Parker* absconded, and in March, 1884, they were adjudicated bankrupts.

Neither *Hervey* nor his administratrix were cognisant of the foregoing transactions, and, the limited company having been ordered to be wound up, it was held by *Bacon*, V.C., upon a summons taken out by *Hervey's* administratrix, that as against Messrs. *Parker* she was entitled as sub-mortgagee or part owner to the

extent of £11,000 and interest of the mortgage for £50,000 created by the indenture of mortgage of the 12th of October, 1882, that as to the 3A. 0R. 8P. the applicant was entitled to priority over the company; that no negligence was to be imputed either to *Hervey* or the applicant for not requiring from the Messrs. *Parker* proper evidence of the mortgage; and that the company had failed to make out a case of purchase for value without notice.

From this decision the official liquidator of the company now appealed.

Sir *Horace Davey*, Q.C., *Millar*, Q.C., and *Bramley*, for the Appellant, argued that the question being between innocent parties the loss should fall on *Hervey* and his representatives, whose negligence had rendered it possible for their agent or trustee to commit the fraud, rather than on strangers like the company, whose position was that of purchasers for value without notice. And they contended that the case was governed by the decisions of which *Rice* v. *Rice* (1), *Hunter* v. *Walters* (2), and *Waldron* v. *Sloper* (3), were examples, and not by *Cory* v. *Eyre* (4).

Hemming, Q.C., and *Stock*, for the Respondent, were stopped by the Court.

Marten, Q.C., and *Maidlow*, appeared for the *Worcester Bank*, and *Whinney*, for the trustees in bankruptcy of the Messrs. *Parker*.

COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon*, by which he in substance declared that the representative of *William Lamplugh Hervey* is entitled as against *Vernon, Ewens, & Co., Limited*, to a charge upon the 3A. 0R. 8P. of land, the legal estate in which is in the *Worcester Bank*, as well as upon the one acre which was the original property of Messrs. *Vernon & Ewens*, the contest being really as to the 3A. 0R. 8P.

[His Lordship then stated the facts of the case down to the

(1) 2 Drew. 73.
(2) Law Rep. 7 Ch. 75.
(3) 1 Drew. 193.
(4) 1 D. J. & S. 149.

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formation of the partnership between *Davis* and *Vernon & Ewens*, on the 10th of October, 1882, and continued:—] Then, the result of the evidence, although it is not very clear, is that the *Parkers* gave up their mortgage against *Vernon, Ewens, & Co.* for £55,000, and on the 12th of October *Davis* gave the *Parkers* a mortgage not only on the one acre and the buildings, machinery, and plant thereon which was the subject of the original mortgage, but on the 3A. 0R. 8P. as well, to secure the repayment of £50,000 which was the amount then due and owing to the *Parkers*. *Hervey*, it must be remembered, had died in July, 1879, and in his residuary account, which was passed in July, 1880, the *Parkers* had entered the sum of £11,000 as due from *Vernon & Ewens* on mortgage of freehold property at *Cheltenham*, which was of course the one acre. Shortly after, in February, 1883, the *Parkers* bought the equity of redemption from *Davis*, and then sold to the limited company which was registered under the name of *Vernon, Ewens, & Co.*; and it is quite clear that the *Parkers* bought the equity of redemption in order that this transaction of forming a company might be carried into effect.

Now the question is whether the representative of *Hervey* has any claim in respect of the 3A. 0R. 8P. as against the limited company, who purchased under these circumstances? I think she has. The result of the first action of the *Parkers* must be looked at, and what is it? It is not that the money of their client actually formed part of the £55,000, which they lent on mortgage to *Vernon* and *Ewens*, upon the security of the one acre and the buildings, machinery and plant thereon; but that they took a sum of money belonging to their client and kept it for themselves. In my opinion they must be treated as holding, for the benefit of their client, £11,000 out of the £55,000 secured upon the mortgage of the one acre. That is to say—having regard to their conduct, the purpose for which they had received the £11,000, the entry in their books and their statements in the residuary account and otherwise, they must be treated as having become trustees for their client of £11,000, part of that mortgage debt of £55,000. Now the mortgage by which that debt was secured was undoubtedly only a mortgage upon the one acre. But then, being trustees of this £11,000,

they had no right to give up their mortgage on the one acre so far as that £11,000 was concerned. What they did in fact was this: They gave up the mortgage of £55,000 with an agreement, which was clearly part of the same transaction, that they should have another mortgage for £50,000, not only on the one acre but upon the 3A. 0R. 8P. also. It is very true that if this agreement had been one to the prejudice of their client, that would not have bound him as regards anyone who claimed an equitable interest under the *Parkers*. But in my opinion the representative of *Hervey*, for whom the *Parkers* were trustees, had the right to say: "You were trustees for me of the sum of £11,000, which was part of the debt secured by the mortgage for £55,000, and although when you released that mortgage we were not bound; yet if you released it upon an agreement that you should have a mortgage for £50,000 on other property, I take my security for the £11,000 for which you were trustee for me, not only on the one acre on which the £55,000 was advanced, but also on that one acre plus the other 3A. 0R. 8P. on which the £50,000 is secured."

The *Parkers* being before the contract of October, 1882, trustees for *Hervey* or his representative of £11,000 part of a mortgage debt, when by arrangement that mortgage debt is secured on other property, the *cestui que trust* has a right to take them, her trustees, to have got the new mortgage to the extent of £11,000, as trustees for her and for her benefit.

Then we come to this further question. The legal estate being outstanding as to the 3A. 0R. 8P. are the limited company in any better position than the *Parkers* were in? Now the *Parkers* bought the equity of redemption, and if they had been entitled to the mortgage debt entirely for their own benefit, that would have merged the mortgage; but as against their *cestui que trust* it would not, to the extent of £11,000, have that effect, because they could not, of course, by buying the equity of redemption for themselves put an end to the equity of their *cestui que trust* in respect of the £11,000. The *Parkers* undoubtedly conveyed to the limited company, but they had not got the legal estate in the 3A. 0R. 8P., and if the representative of *Hervey* had an equitable claim as *cestui que trust* that would not be put an end to by the purchase of the equity of redemption.

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It is said that the claim of the representative of *Hervey* ought to be and is simply against the 5000 fully paid-up shares which were given by the limited company as consideration, and that if his representative can follow the mortgage for £11,000 which was originally on the one acre only, to the 3A. 0R. 8P., she must consequently follow her right only as against the 5000 shares. But in my opinion that is not so.

The release of the original mortgage would not have bound her, but though, as I have already said, she had the right to follow for her £11,000 the security which her trustee got she is not bound to do so as regards the 5000 shares. This might have been the case if the company had a good right against her as well as against the *Parkers*, but her mortgage debt still remained as against the company, and although she might follow it as regards the security, she was not bound to pursue her rights as against that which her trustees improperly obtained, by their improper attempt to get rid of the mortgage which they held as trustees for her, and to keep that which was substituted for it.

But then there remains to be dealt with the question whether there has not been such negligence on the part of *Hervey* or his representative as to deprive them of their rights, for it is said that here, although the equity of the claimant was prior to that of the limited company, yet they have so behaved that the company may have an equity against them. Now, in my opinion, that contention cannot be sustained. Several cases were referred to by Sir *Horace Davey*, but it will be found that in all those cases where the defence was raised, there was something done by the person entitled to a beneficial right which, when it was known, had the effect of putting an end to his claim. Take the case of *Rice* v. *Rice* (1). In that case there is a very learned judgment of Vice-Chancellor *Kindersley*, of which I desire to speak with all respect; but in my opinion that case might have been disposed of very shortly. The vendors were attempting to enforce an equitable lien for unpaid purchase-money, but they had signed a receipt for the purchase-money, and had put that receipt, so signed, into the hands of the purchaser. That enabled him to say, "Here you see the purchase-money has been paid, there is

(1) 2 Drew. 73, 84.

no claim whatever on behalf of the vendor against this property." It is quite clear, in my opinion, that that gave the mortgagee for value without notice from the purchaser a perfectly good defence as against any claim which the vendor had. Then take the case of *Hunter* v. *Walters* (1). There what had been done was this; one of the persons entitled to a mortgage had released it and signed a receipt for the money, which receipt he put into the hands of his solicitor, whom, no doubt, he trusted; but then, by putting that receipt into his hands, he had actually put it into the power of the solicitor to go and say "here is a mortgage which the abstract of title shews is at an end, and I am in a position to deal with the property without regard to that mortgage."

Then there was a case of *Waldron* v. *Sloper* (2); and that is the case which may be said to be most like the present; but what was it? *Waldron* had an equitable security which was the first incumbrance on the property, and he put the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any inquiry from *Waldron*, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to have acquired in the name of his client, but has in fact acquired in his own name. *Cory* v. *Eyre* (3) is somewhat like the present case, but in my opinion it is not necessary to go through it.

In the present case the solicitor of Mr. *Hervey* having money of Mr. *Hervey's* intrusted to him for investment did not invest it as he ought to have done in a security taken in the name of his client; and on the conveyance of the estate he so acted as, in my opinion, to constitute himself a trustee. And although the client made no inquiry, yet, in my opinion, as there was nothing to excite his suspicion (for if there had been that might have been another thing) he cannot be postponed on the ground that he did not make inquiry, but continued to trust his

(1) Law Rep. 7 Ch. 75. (2) 1 Drew. 193.
(3) 1 D. J. & S. 149.

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solicitor whom he had no reason to doubt. There is a passage in *Shropshire Union Railways and Canal Company* v. *Reg.* (1) very applicable to the present case. I mean that in which it is said that the *cestui que trust* is entitled to trust in and place reliance upon his trustee, and is not bound to inquire whether he has committed a fraud against him unless there is something to raise his suspicion. Accordingly it is not a sufficient ground for postponing the client, for whom the solicitor had become a trustee, but was not openly a trustee, simply because the client had not made inquiry as to how the solicitor had performed his duty. In my opinion, therefore, the appeal fails.

I should mention one matter, and that is this. The order which had been obtained in bankruptcy undoubtedly gave a right to *Hervey's* representative as against the 5000 shares. If in fact she had insisted on her right to the purchase-money that would have given her a right to the shares, but I think that order is only to be looked upon as a matter of precaution. That she did not confirm the sale free from the mortgage is, in my opinion, clear when one looks at the order and sees that it asserts her right, not only as against the shares, but as against the property comprised in the mortgage, and treats the mortgage as still subsisting. It is only that as between her and the bankrupt, *Parker*, she is entitled to this, and it might be that if the company had established their claim to be freed from the equitable right of the claimant she would have been bound to go against the shares, and in that case, if her trustee had dealt with her property and she could not follow it as against the purchasers, she might, and probably would, have a right as against that for which the *Parkers* had improperly sold their property so as to defeat her right. I do not think that that order really ought to prejudice the claim made here by the personal representative of *Hervey* who otherwise would be entitled to what the Vice-Chancellor has given.

LINDLEY, L.J.:—

I am of the same opinion. I think the Vice-Chancellor has come to a right conclusion upon both points which have arisen in this case. The first point is, no doubt, whether the adminis-

(1) Law Rep. 7 H. L. 496.

tratrix of *Hervey* has made out as a matter of fact that £11,000, part of the £50,000 secured by the mortgage of the 12th of October, 1882, which comprised the 3A. 0R. 8P., was *Hervey's* money; in other words, whether the *Parkers* were trustees for his estate of that £50,000 to the extent of the £11,000. That is a question of fact to be ascertained by investigating the circumstances under which the *Parkers* obtained that £11,000, and under which the mortgage was given. I need not go through the facts again. They are familiar to us all now. It appears to me that nobody could possibly come to any other conclusion than that the *Parkers* were plainly taking that mortgage as a security for the £11,000 as well as for other moneys which they held. That the £11,000, part of the £50,000, belonged to *Hervey's* estate is made out to my mind as clearly as anything can be made out in the absence of the *Parkers*, who have absconded. Now that being the first question, the next is whether the company can claim any better equity than *Hervey's* representative in respect of this land upon which the £50,000 is charged. They say that they are purchasers for value without notice of this equity of the Applicant. Well, if they had had the good fortune to obtain the legal estate, perhaps that might have been made out. The Vice-Chancellor has given very good reasons why they should have failed even on that point, but I have not gone into that because it has not been opened to us. It has been properly put upon another ground, namely, that the company, not having obtained the legal estate in the 3A. 0R. 8P., must shew that the persons equitably entitled to this £11,000 have by their negligence, or want of care, or want of prudence, so misled the company as to have lost what is called the better equity which they otherwise would have had. This is the point for consideration. There is no doubt whatever that Mr. *Hervey* and his administratrix trusted the *Parkers* who were their solicitors. There is no doubt also that the company on the other hand trusted the *Parkers*. Both parties thought them honest men, and both parties were deceived. But upon what ground can it be said that one trusted them more than the other? Or that because both trusted them the Applicant is to suffer from the *Parkers'* frauds rather than the company? I do not know. It is said that the *Parkers' cestuis que trust* did

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not look sufficiently after their securities. But let us consider what prudent men advancing money usually do in the way of looking after their securities? And can it be said that *Hervey* or his representative omitted to do that which any prudent men would have done? I do not think it can. They seem to have conducted themselves just as other clients conduct themselves towards their solicitors. And we must bear in mind this—that they did nothing themselves. They had to sign no document. There is no receipt indorsed—no such element as occurred in *Hunter* v. *Walters* (1) and *Rice* v. *Rice* (2) or any of the cases of that class. It was simply that they got the *Parkers* to obtain a security, and the *Parkers* did obtain it. Then it is said that because they did not look after the *Parkers* they cannot avail themselves of the security as against the company, who have got the property. But I do not see any such negligence, or any such want of duty or of prudence on the part of *Hervey* or his administratrix as to entitle the company to maintain that they have got the better equity. The case appears to me like *Cory* v. *Eyre* (3), which was very fully discussed, and the principle of which was followed by the House of Lords in *Shropshire Union Railways and Canal Company* v. *Reg.* (4). In that case the question was between two equitable claimants of certain shares which had been allowed by the *cestuis que trust* thereof to remain in the name of the trustee, and he had misapplied them. There the *cestuis que trust* had done nothing; they had not signed any receipt or misled anybody. They and the rival claimant had both trusted the same person. It was a pure question as to who was entitled to the better equity, and there is no distinction between the conduct of the *cestui que trust* in that case and the conduct of *Hervey* and his representative. The House of Lords considered that the *cestuis que trust* had not done anything whatever to lose their equitable title to the shares. Nor have these persons; and when once you get the fact that they were the *cestuis que trust* of part of the £50,000 mortgage the rest of the case follows. It appears to me therefore that the appeal ought to be dismissed.

(1) Law Rep. 7 Ch. 75.
(2) 2 Drew. 73.
(3) 1 D. J. & S. 149.
(4) Law Rep. 7 H. L. 496.

LOPES, L.J. :—

I entirely agree, and I only desire to refer to one part of the case. It is said that although the equity of *Hervey* and his administratrix is an equity prior to that of the company, yet that the Applicant is disentitled to the relief she prays against the company, who are purchasers for value without notice, by reason of conduct. It is said that *Hervey* and his administratrix have been guilty of negligence and laches, and that they have been imprudent. And it is put in this way, that they left the money in the hands of the *Parkers* and made no inquiry as to what they were doing with it. But it also appears that they had not the slightest grounds for suspecting or distrusting the *Parkers*; and in point of fact the evidence rather goes to shew that they had every reason to believe in them and to trust them. In my opinion it would be startling indeed, if the mere leaving of money or deeds in the hands of bankers or in the hands of solicitors without periodically inquiring into their acts and proceedings, should be held to disentitle a plaintiff to relief in circumstances like the present, and to cause her security to be postponed as is sought to be done in this case.

I think, therefore, that the decision of the Vice-Chancellor should be affirmed.

Solicitors : *Francis & Johnson; Dixon, Ward, & Co.; Church, Rendell, & Co.*

W. W. K.

C. A.
1886
Aug. 9.

In re JONES A PERSON OF UNSOUND MIND. ZINCRAFT'S WILL TRUSTS.

Lunacy of one of several Mortgagees—Trustee Act, 1850, *ss.* 3, 5, 20 [*Revised Ed. Statutes, vol. x. pp.* 983, 984, 986].

Sect. 3 of the *Trustee Act*, 1850, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mortgagee, but extends to the case where he is one of several trustees or mortgagees.

One of two trustees being of unsound mind, a new trustee was appointed in his place under a power :—

Held, that the Court had jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mortgage, forming part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee.

WILLIAM JONES, senior, *H. Alford*, and *W. Jones*, junior, were the trustees of the will of *R. G. Zincraft*. *W. Jones*, senior, died in 1873. On the 3rd of July, 1886, *W. Jones*, junior, being of unsound mind, though not so found by inquisition, *J. Osborne* was, under a power in the will, duly appointed trustee in the place of *John Jones*, senior, and *John Jones*, junior, and the deed contained a declaration vesting the trust estate in *Alford* and *Osborne* under the *Conveyancing and Law of Property Act*, 1881, s. 34, sub-s. 1, but part of the trust property consisted of a mortgage of freeholds made to *W. Jones*, junior, and *Alford*, and a sum of New £3 per Cents., which, by sub-sect. 3, were exempted from the operation of the section. A petition was then presented asking that *Osborne* might be appointed trustee, and that an order might be made vesting the mortgaged estate and the right to transfer the stock in *Alford* and *Osborne*.

Dunning, for the Petitioner :—

It is understood that the Court has lately held that *In re Dalgleish's Settlement* (1) and *In re Pearson* (2) are not to be followed: see *In re Vicat* (3); and that the trustee having been duly appointed cannot be reappointed. If so, I ask the Court to appoint a person to convey the interest of the trustee of unsound mind.

(1) 4 Ch. D. 143. (2) 5 Ch. D. 982. (3) *Ante*, p. 103.

COTTON, L.J.:—

A doubt has been raised, which was discussed in a recent case before us, but has never been adjudicated upon, whether sect. 3 of the *Trustee Act*, 1850, applies where the lunatic is not solely seised or possessed of land on trust or by way of mortgage, but is only one of several trustees or mortgagees. The doubt arose in consequence of the frame of the 5th section, which, after providing for the case of a lunatic being solely entitled to any stock or any *chose in action* upon trust or by way of mortgage, provides expressly for the case where other persons are entitled jointly with him. We are of opinion that the 3rd section does apply to the case. There appears to us no reason why it should not apply. The interpretation clause provides that the word "lands" shall extend to and include hereditaments of every tenure or description, "whatever may be the estate or interest therein." Under these words, which are as wide as possible, it is clear that a lunatic who is one of several trustees or mortgagees, is seised or possessed of "lands" upon trust or by way of mortgage, within the meaning of the Act, unless there is something in the other parts of the Act to modify the construction. We do not think that sect. 5 has that effect. It would be very inconvenient if sect. 3 were not applicable, for there is no other section providing for dealing in lunacy with lands in mortgage. We therefore state our opinion that sect. 3 applies, and that we can appoint a person to convey under sect. 20.

LINDLEY, L.J.:—

A doubt has been raised as to the applicability of sect. 3 to such a case as this, which doubt has not yet been solved. I am of opinion that the section does apply. The words are, "shall be seised or possessed of any lands upon trust or by way of mortgage," not saying anything about the lunatic's being solely or jointly seised, and though in the present case he is not solely seised, still, having regard to the interpretation clause, he is seised of lands. Sect. 5 provides for the case of a lunatic solely entitled, and it was necessary then to provide for the case of his being jointly entitled. The fact that the two cases of sole title and joint title are expressly dealt with separately in sect. 5

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appears to me to be no reason why we should confine the meaning of sect. 3, which is expressed in terms wide enough to include them both.

LOPES, L.J. :—

I am of the same opinion.

Solicitors: *Meredith & Co.*

H. C. J.

C. A. 1886 NORTH, J. *June* 25; *July* 10. C. A. *Aug.* 10.

In re DEWHIRST'S TRUSTS.

Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34, 35 [*Revised Ed. Statutes, vol. x. p.* 990]—*New Trustee—Vesting Order—Jurisdiction.*

A new trustee was appointed, under a power, in place of a trustee who had become incapable :—

Held, that there was no jurisdiction under the *Trustee Acts* to reappoint the new trustee and vest the trust estate in the continuing trustees and the new trustee.

In re Dalgleish's Settlement (1) overruled.

THIS was a petition in the Chancery Division for the appointment of a new trustee and for a vesting order in respect of the subsisting trusts of the will and codicils of *Thomas Dewhirst*, who died in 1870. As often as his first or future trustees, or any of them, should die, or desire to be discharged from, or refuse, or decline, or become incapable to act in the trust, the testator empowered the then surviving or continuing trustees or trustee, or the executors or administrators of the last surviving or continuing trustee, by deed to appoint a new trustee or trustees.

The original number of trustees was three. In January, 1885, *Charles Illingworth*, one of the three then trustees of the testator's will, was attacked by aphasia, which was accompanied by partial paralysis; he became and remained wholly incapacitated from attending to or understanding business.

By an indenture, dated the 19th of April, 1886, the other two trustees, *Thomas Dewhirst* and *Edmund Dewhirst*, appointed *Edward Stephenson* a trustee of the will and codicils of the testator in place of *Charles Illingworth*.

(1) 4 Ch. D. 143.

The petition prayed that *Edward Stephenson*, or some other fit and proper person, might be appointed trustee of the will and codicil of the testator, so far as regards certain sums secured by mortgage, in the stead of *Charles Illingworth*; for an order vesting the mortgaged property in *Thomas Dewhirst*, *Edmund Dewhirst*, and *Edward Stephenson*, for the estate or interest then vested in *Thomas Dewhirst*, *Edmund Dewhirst*, and *Edward Stephenson*; and that the right to sue for the mortgage debts might be vested in *Thomas Dewhirst*, *Edmund Dewhirst*, and *Edward Stephenson*.

The petition was heard before Mr. Justice *North* on the 25th of June, 1886.

Church, for the petition:—

A similar order to that asked has been made by the Court in *In re Dalgleish's Settlement* (1) and in *In re Crowe's Trusts* (2). But in a case, only reported yet in the *Weekly Notes*, *In re Vicat* (3), the Court of Appeal refused to follow *In re Pearson* (4), a lunacy matter in which a similar order was made. That case is distinguishable because the application was in Lunacy, and in Lunacy there is jurisdiction to make a vesting order apart from an appointment of a new trustee.

NORTH, J.:—Let the case stand over, and if necessary I will speak to one of the Lords Justices as to the facts in *In re Vicat*.

July 10. NORTH, J.:—

I cannot make the order asked for. I am not aware that there is any more power or usual practice of reappointing trustees who have been regularly appointed in Chancery matters than there is in Lunacy. The principle of the case, *In re Vicat*, where the Lords Justices refused to reappoint a person already validly appointed, applies, in my opinion, to every case. I must accept what was done in that case as the existing practice, and not do what was done in the earlier cases. I cannot see any difference in principle whether the application is made because of the lunacy of a trustee or because he is unable to act from some other cause.

(1) 4 Ch. D. 143.
(2) 14 Ch. D. 610.
(3) Since reported, *ante*, p. 103.
(4) 5 Ch. D. 982.

C. A. 1886 *In re* DEWHIRST'S TRUSTS.

I have reason for thinking that the general practice is as stated in that case.

D. P

From this decision the Petitioners appealed. The appeal was heard on the 10th of August, 1886.

C. A.

Church, for the Petitioners:—

In re Dalgleish's Settlement (1) was not cited in *In re Vicat* (2). It has been frequently acted on by the Courts and has never been overruled: *In re Pearson* (3); *In re Harford's Trusts* (4); *In re Crowe's Trusts* (5). *In re Vicat* was in Lunacy and it was possible to make an order under the Act without re-appointing the trustee. Where the evidence, as in the present case, is not sufficient to shew that the trustee is a lunatic or of unsound mind no vesting order can be made without the appointment of a new trustee by the Court.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North*, refusing to make an order under these circumstances: There were three trustees of the will of a testator, one of them, although not a lunatic, was in such a state of mind and body that he was not able to attend to any business. Under a power in the will another person was appointed trustee in his place, but, as he is unable to assign the mortgages in which the trust funds are invested, in order to get rid of the difficulty a petition has been presented asking the Court to appoint the same person as trustee under sect. 32 of the *Trustee Act*, 1850, in order that the Court may make a vesting order under sect. 34 of the same Act. Sect. 32 says that "whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery," it shall be lawful for the Court to appoint one. Is it expedient to appoint a trustee in this case? There are already

(1) 4 Ch. D. 143.
(2) *Ante*, p. 103.
(3) 5 Ch. D. 982.
(4) 13 Ch. D. 135.
(5) 14 Ch. D. 304.

three trustees, and it is desired to reappoint one of them, not because a new trustee is wanted, but in order to give the Court jurisdiction to make a vesting order under sect. 34. To do so would, in my opinion, be wrong; it would not be a proper exercise of the powers of the Act, because the circumstances contemplated by the Act do not exist. It does not appear to me to be the duty of the Court to make an order contrary to an Act of Parliament in order to relieve parties of a difficulty. It is for Parliament to amend an Act if an amendment be required. It is not for Judges of the first instance or of the Court of Appeal to avoid the difficulty by misconstruing the Act. It is said that there is authority in favour of the Petitioners, and that such an order was made by the Court of Appeal in *In re Dalgleish's Settlement* (1). I have always steadily refused to follow that decision. There is no Judge for whom I feel a greater respect than Lord Justice *James*, but whether he had the point brought to his attention and argued before him does not appear in the report. If there was any doubt whether the trustee in that case had been properly appointed, it might be right for the Court to reappoint him. But if Lord Justice *James* did express an opinion that a trustee might be reappointed in such circumstances as those now before the Court I decline to follow that opinion. I have known cases in which this Court has declined to be bound by previous decisions of the Court of Appeal, even when pronounced by such eminent Judges as Lord Justice *Knight Bruce* and Lord Justice *Turner*. I doubt whether Lord Justice *James* did decide this point, but if he did we must overrule his decision so that the case may no longer be treated as an authority.

I do not think there is so much difficulty in this case as the Petitioners allege. The former trustee is paralytic and is unable through infirmity of mind to manage his own affairs. He is therefore of unsound mind though not strictly a lunatic, and, that being so, a vesting order can be made under another section for transferring the estate to the new and the continuing trustees. The decision of Mr. Justice *North* was right and the appeal must be dismissed.

(1) 4 Ch. D. 143.

C. A. 1886 *In re* DEWHIRST'S TRUSTS.

LINDLEY, L.J.:—

So far as I remember, *In re Dalgleish's Settlement* (1) has not been followed whenever our attention has been drawn to the point. If it had, we might have felt some difficulty in declining to follow it now. It may sometimes have been followed *per incuriam*. I cannot see how this person can be appointed a trustee by the Court in accordance with the Act of Parliament unless there was some defect in his previous appointment. I cannot bring the case within either sect. 32 or sect. 34.

LOPES, L.J.:—

If we were to do what we are asked to do, we should be evading the Act of Parliament. We are asked to appoint a person trustee notwithstanding the fact that he has been already duly appointed. To do this would be a mere farce. I agree with what the other Lord Justices have said with respect to *In re Dalgleish's Settlement*.

Solicitors: *Prior, Church, & Adams*, agents for *Gardiner & Jeffery, Bradford*.

M. W.

C. A. 1886 *Aug.* 7, 9, 11.

LORD DYNEVOR *v.* TENNANT.

[1885 D. 478.]

Lease—Construction—Easement—Grant by Lease—Merger in Reversion.

In 1820 the co-owners demised for a term of 1000 years a strip of land intersecting their estate for the purpose of making a canal, with a proviso that nothing in the lease contained should prevent the co-owners, their heirs and assigns, from using the demised land, or from granting any way-leaves or roads over the same in like manner as they could or might have used the same in case the lease had not been granted, but so as not to injure the canal. In 1838 the estate was partitioned by deed between *A.*, *B.*, and *C.*, the co-owners, the reversion of part of the canal being conveyed to the use of *B.* and the abutting lands to *A.* and *C.* severally. In 1839 *B.* conveyed his reversion in that part of the canal to the lessees:—

Held, on the construction of the lease of 1820, that the right of way across the canal reserved by the lease was a regrant to the lessors as

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(1) 4 Ch. D. 143.

owners of the reversion of the demised land and not to them as owners of the land intersected by the canal; and that accordingly, when by the conveyance by *B.* in 1839 to the lessee the term became merged in the reversion, the rights of *A.* and *C.* over the land comprised in that conveyance were thereupon extinguished.

Decision of *Pearson*, J., affirmed.

THIS was an appeal by the Plaintiff from the dismissal of his action by the late Mr. Justice *Pearson* (1).

The facts are reported 32 Ch. D. 375, but it will be necessary to set out more fully certain portions of the indenture of the 22nd of June, 1820, which were referred to in their Lordships' judgments.

By this indenture, after reciting that *George Tennant* had lately made a navigable canal between the rivers *Neath* and *Tarvey* upon lands demised to him by the Duke of *Beaufort*, and that it had been deemed (*sic*) that a collateral branch or navigable canal should be cut from the said canal so already formed upon and over certain lands of Lord *Dynevor*, *Henry Combe Compton*, and *Sarah Doyley* (who were owners in undivided thirds of the *Neath Abbey* estate), and to pass as nearly as conveniently might be to certain copper-works and an iron-foundry on the estate of Lord *Dynevor*, *H. C. Compton*, and *Sarah Doyley*, and that *George Tennant* had proposed to the lessors to make a collateral branch or navigable canal over the said last-mentioned lands, or some parts thereof, upon having a lease of such lands as might be necessary or convenient for forming the same; the lessors demised unto *Tennant* for the term of 1000 years so much of a piece of land on the northern bank of the River *Neath* and to east of the canal so already made by the said *George Tennant* as should be necessary to be used for the formation or use of the intended canal or the navigation thereof, or for the more commodiously using the same, or for any of the purposes aforesaid, together with all ways, waters, watercourses, easements, rights, privileges, and appurtenances whatsoever to the demised land belonging or in anywise appertaining, "Save and except out of this demise all brooks, rivulets, and streams of water flowing or to flow over or through the land or ground thereby demised, or any part thereof, and which then were, or should or might at any time thereafter

(1) 32 Ch. D. 375

C. A. 1886 LORD DYNEVOR v. TENNANT.

be, used for the purpose of supplying any mill or mills or other machinery, with full and free liberty to and for the said Lord *Dynevor*, *H. C. Compton*, and *Sarah Doyley*, their heirs or assigns, to divert or turn or otherwise use such brooks, rivulets, or streams of water, or any of them, in like manner as they would or might have used the same if this lease had not been granted." The lease also contained a covenant by the lessee to erect and build such reasonable number of bridges for the passage of cattle, carts, and carriages over and along the said canal as Lord *Dynevor* or his agent, should within twelve months after the canal should be made navigable, require and direct for that purpose, and from time to time and at all times during the said term keep the same bridges when erected and built in good and sufficient repair: "Provided always, and it is hereby expressly declared and agreed between and by the said parties hereto that nothing herein contained shall prevent or hinder the said Lord *Dynevor*, *H. C. Compton*, and *Sarah Doyley*, their heirs or assigns, from using all or any of the land or ground hereby demised or intended so to be, or any stream or streams of water flowing over or through the same, or from granting any wayleaves or roads over or across the same for carriage of coal, goods, wares, or merchandises, or for any other purpose or purposes whatsoever, in like manner as they could or might have used the same in case this present lease had not been granted, but so nevertheless as not to prejudice or injure the said canal intended to be made as aforesaid, or the navigation thereof, or any road or towing-path, work or works, which shall be made or constructed for the use or convenience of the same by the same *George Tennant*, his executors, administrators, or assigns, under or by virtue of the powers or authorities herein contained." It was also provided that when the canal should have been completed arbitrators should be appointed, one by and on behalf of the lessors, their heirs and assigns, and another by and on behalf of the lessee, his executors, administrators, and assigns, with a third arbitrator to be named by the two; and such three arbitrators should estimate any damage done to the surface of any of the lands of the lessors, their heirs and assigns (other than those thereby demised), by or in consequence of the canal or works to be made by the lessee under the powers of the lease.

In July, 1838, pursuant to a private Act of Parliament, a deed of partition was executed by which the *Neath Abbey* estate was conveyed (with the exception of mines and minerals as therein mentioned) by reference to three schedules: as to the lands in the first schedule, to the use of Lord *Dynevor* in fee; as to the lands in the second schedule, to the use of *H. C. Compton* in fee; as to the lands in the third schedule, to the use of the *Dynevor* trustees, who took under an appointment previously exercised in their favour by *Sarah Doyley*.

The apportionment of the lands in the schedules was taken from the Act of Parliament, and the second portion, to which *H. C. Compton* became entitled, comprised a portion of the lands taken for the canal and abutting for its whole length on one side on lands comprised in the first schedule, on the other side on lands partly comprised in the first and partly in the third schedule.

The partition deed did not in any way refer to the rights and easements in respect of the canal reserved by the lease of 1820.

By deed of March, 1839, *H. C. Compton* conveyed to *H.* and *C. Tennant*, who were then entitled to the benefit of the lease of 1820, and owners of the canal, certain portions of the lands comprised in the second schedule to the deed of partition of 1838, including that portion of the canal and towing-path which was comprised in the second schedule.

The Plaintiff, the present Lord *Dynevor*, was tenant for life of the lands comprised in the first and third schedules of the partition.

The Defendant, *Gertrude Barbara Rich Tennant*, was entitled to the estate vested in *H.* and *C. Tennant* under the deed of March, 1839, and under the lease of 1820, so far as it comprised lands not included in the deed of March, 1839.

The Plaintiff in exercise of the reservations contained in the lease of 1820 claimed the right, and had given notice of his intention, to build a bridge over a portion of the canal and towing-path comprised in the second schedule.

The Defendant disputed the Plaintiff's right to build the proposed bridge; and to assert such right this action was brought, and tried before Mr. Justice *Pearson* on the 18th of March, 1886.

C. A. 1886 LORD DYNEVOR v. TENNANT.

Mr. Justice *Pearson* had dismissed the action, holding that whether the proviso in the lease did or did not operate as a regrant of an easement, the merger of the lease by the conveyance of 1839 put an end to the right conferred by the proviso in respect of the particular portion of the canal (1).

From this decision the Plaintiff appealed.

Barber, Q.C., and *E. Bray*, in support of the appeal:—

The rights or easements specified in the proviso contained in the lease of 1820, were regranted to the three co-owners of the *Neath Abbey* estate, not as owners of the reversion, but for their benefit as owners of the lands adjoining the canal; the obvious intention being to preserve communication between the different parts of the estate so far as could be done without injury to the dominant and servient tenements during the subsistence of the lease. No surrender or merger of the lease as to a portion of the lands therein comprised can prejudice the rights of third persons who have not been parties or privies to the deed of surrender: *Saint* v. *Pilley* (2); *Co. Litt.* (3); *London and Westminster Loan and Discount Company* v. *Drake* (4); nor can any voluntary act, on the part of either *Compton* or the successors of the original lessee affecting their own interests in the term, be allowed to prejudice rights which, for value, have been created in favour of the Plaintiff by the original lessee: *Mellor* v. *Watkins* (5); *Great Western Railway Company* v. *Smith* (6).

Cookson, Q.C., and *E. Beaumont*, for the Defendant (the Respondent):—

The right of making roads over the canal was a license reserved to the grantors of the lease as incident to the reversion, and under the partition deed became absolutely vested in *Compton*, as the person to whom that portion of the land, to which the license alone applied, had been allotted. *Compton* was in no way fettered by anything contained in the partition deed from dealing with his reversion; and by conveying it, as he had the right to do, to

(1) See 32 Ch. D. 375.
(2) Law Rep. 10 Ex. 137.
(3) Page 338 b.
(4) 6 C. B. (N.S.) 798.
(5) Law Rep. 9 Q. B. 400.
(6) 2 Ch. D. 235.

the Defendant, the lease of that portion has come to an end, and with it all rights thereunder are absolutely gone. If it had been intended to reserve these rights the partition deed would not have been absolutely silent. By analogy to the case of restrictive covenants, the property which is to be affected, to the injury of the canal traffic, with this very inconvenient proviso must be clearly defined: *Renals* v. *Cowlishaw* (1).

E. Bray, in reply:—

The Court will adopt that construction of the proviso which will best carry out the object for which it was introduced, viz., to preserve the right of communication between the lands severed by the canal. The proviso by which the right of way over the canal is reserved to the lessors is not an exception or reservation, but is the grant of an easement inseparably annexed to the severed lands as the dominant tenement, so as to lend itself to every devolution of title for the benefit of the riparian owners on either side of the canal, in favour of whom, and not of the lessors as reversioners, this right was created.

[He cited *Sheppard's* Touchstone (2); *Woodfall* on Landlord and Tenant (3); *Durham and Sunderland Railway Company* v. *Walker* (4); *Rangeley* v. *Midland Railway Company* (5).]

COTTON, L.J. (after stating the facts, proceeded):—

The terms of this deed of partition seem to be somewhat extraordinary, for the reversion of the canal or the ground covered by the canal was granted in sections to the three co-owners. One portion or section of the reversion was granted to Mr. *Compton* and created a division of the estates which had been, upon the partition, allotted to Lord *Dynevor*. The question arises as between Lord *Dynevor* and Mrs. *Tennant*, in whom the reversion of that part of the canal is now vested, as to the right of Lord *Dynevor* to cross the canal, and of course the towing-path which there is by the side of it. A question arises also whether Lord *Dynevor* is entitled besides going across the canal, to cross on

(1) 11 Ch. D. 866.
(2) Page 78.
(3) 13th Ed. p. 178.
(4) 2 Q. B. 940, 967.
(5) Law Rep. 3 Ch. 306.

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foot or in carts, and whether for so doing he may put a bridge across it. Mr. Justice *Pearson* held that the effect of the deed of partition and the subsequent conveyance of the reversion by *Compton* to *Tennant*, which operated as a merger of the 1000 years' term, was to put an end to the right of the owners of the adjoining land to cross the canal.

Now, in my opinion, the purchase of the reversion by the owner of the canal had no effect upon Lord *Dynevor's* right if granted as an easement in respect of the land of which he is owner on each side of the canal. It is obvious that the right was only during the term of 1000 years, and the owner of the term could not, by voluntarily purchasing the reversion, or by surrendering the term, put an end to the right which was vested in another person, or affect his right and interest in the term, or in the property comprised in the term. But the question which we have really to consider is what is the effect of the demise; does it grant the easement by way of regrant to the lessors as owners of the land adjoining the canal, or does it grant a right to them as landlords, that is to say, as owners of the reversion. It appears from the lease that the canal was to run through the land of the three persons named. The lease does undoubtedly point to the property vested in these three persons, and to my mind it is sufficiently obvious that the intention of the reservation, which I call the regrant, is for the benefit of the adjoining lands, but that is a very different thing from saying that the reservation is by way of regrant to those persons as owners of such adjoining lands, and not as the landlords. What is the demise? It is a lease by the owners of the estate to Mr. *George Tennant*. It recites that he has made the canal, and that a collateral branch was to be made over certain lands of the three lessors as nearly as conveniently might be to certain copper-works and an iron-foundry, which were upon the estate of those three persons. It does not define the actual lands or estates over which the canal is to be made or the site of it, but it says that he (*Tennant*) is to have demised to him all that tract or parcel of marshy or wet ground situate near or adjoining to the banks of the River *Neath*; and then comes this exception, "Save and except, &c." [His Lordship read the words of exception set out in the statement.]

Then, immediately preceding the proviso which is principally in question, there is a covenant by *Tennant* to make such bridges for the passage of carts and carriages as Lord *Dynevor* or his agent should, within twelve months next after the canal shall be made navigable, require or direct for that purpose, and shall keep the same when built in good and sufficient repair. Then follows the proviso in question [which his Lordship read]. As I said before, to my mind it is obvious that this proviso was inserted with reference to the fact that the grantors of this lease had considerable property in the neighbourhood, but the question is what is the way in which that is expressed. How is this proviso, which I take to be by way of regrant, expressed? It is that nothing contained in the lease shall in any way prevent the grantors from doing certain things. That to my mind amounts to this, that the landlord, by making this demise, is not to be interfered with in coming over this land. Of course that would apply before the canal is made, and it would apply not only then but after the canal was made. Undoubtedly, in my opinion, this clause was inserted with reference to the fact that the lessors were owners of adjoining lands; but in dealing with the regrant I am more entirely following the terms of this clause by saying that it is a regrant not to those persons as owners of the adjoining land, but a regrant to them as being landlords or lessors who, by this demise, are to a certain extent putting out of their power the land which they have demised. To my mind this construction is aided by the clause which follows, that the arbitrators shall estimate any damage which may be done to the surface of any of the lands of the said (lessors) "other than those hereby demised." The proper construction, I think, of the clause in question is that it is a regrant to those who made the demise as owners of the reversion of the land upon which the canal is made. It is very true that as reversioners they could not avail themselves of the proviso when they parted, if they parted, with the adjoining land, but that was not contemplated at the time. They were owners of large adjoining property, and except as far as they have parted with the adjoining lands, they might make the privilege available by using it for the lands which adjoin the canal. I have not dealt with the difficulties which would arise from the other

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construction, but I have taken it upon the construction of this covenant and I should have great difficulty in holding that that is a regrant to Lord *Dynevor* and his assigns of any part of his property adjoining the canal on the one side or the other. Upon the true construction I think it is a grant to the landlord and not to the owners of adjoining land. In that respect of course the decision of Mr. Justice *Pearson* in effect was correct, and it will not be necessary therefore to enter into the questions which might otherwise have arisen.

LINDLEY, L.J.:—

I have come to the same conclusion. The whole difficulty arises from the fact that the lessors were both owners of the reversion of the land demised and also owners in fee of the adjoining land on either side of the canal. The lease must be looked at minutely in order to gather the intention of the parties. What heirs and assigns of the lessors were there referred to? They must be the assigns of the owners of the land demised and not of the owners of the adjoining land. That would be obvious if the lands demised and the adjoining lands belonged to different persons; or if the lands were not all freeholds. The fact that all the lands were freehold and belonged to the same persons does not alter the construction of the lease. The lease no doubt in some parts is obscure. Whether the proviso is to be construed as a proviso or a regrant is doubtful, but our decision solves the whole difficulty.

LOPES, L.J.:—

I entirely concur, and have nothing to add to the judgment.

Solicitors: *Warrens; Finch, Jennings, & Finch.*

F. G. A. W.

In re SEBRIGHT'S SETTLED ESTATES.

C. A.
1886
NORTH, J.
July 27;
Aug. 2, 3, 4.
C. A.
Aug. 11.

[1886 S. 1738.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 50—*Tenant for Life—Sale of Mansion-house and Park—Assignees of Tenant for Life—Consent.*

The Court, in the exercise of the discretion given by sect. 15 of the *Settled Land Act*, in respect to ordering a sale of the mansion-house and park on the settled land where the trustees of the settlement do not consent, will not, where the tenant for life has mortgaged his life interest to its full value, make the order on his application without full information as to the proposed sale and the consent of the mortgagees.

SUMMONS under the *Settled Land Act*, 1882, by Sir *John G. S. Sebright*, who was equitable tenant for life of certain settled estates, under the will of his father, Sir *Thomas G. S. Sebright*, asking that the Applicant, who was desirous of selling the other settled hereditaments of which he was tenant for life under the will, might be at liberty to sell also the mansion-house, called *Beechwood*, in *Hertfordshire* and the demesnes thereof, and the other lands usually occupied therewith, pursuant to the provisions of the Act, in such manner and subject to such particulars, conditions, and provisions as he might think fit. The summons also asked that the trustees, with power of sale, of the will, might be appointed trustees for the purposes of the Act in relation to the mansion-house and park and lands lying within two miles thereof, which by the will was excepted from the power of sale therein contained.

Sir *Thomas*, the Applicant's father, by his will dated the 22nd of March, 1851, devised all his real estates to trustees, in fee, upon trust, in the first place, out of the rents thereof to pay certain annuities, and subject thereto in trust for his son, the Applicant, and his assigns for his life, without impeachment of waste; with remainder in trust for the first and other sons of the Applicant successively in tail male; with remainder in trust for the testator's second and other younger sons successively in tail male; with divers remainders over, the ultimate remainder being in trust for the testator's own right heirs for ever: Provided always, that, if any person to whom any estate in tail male by

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purchase was thereby limited should be born in the testator's lifetime, or in due time after his decease, the estate in tail so limited should be divested, and in lieu thereof the trustees should hold the hereditaments thereby devised to them in trust for the person who then was or should be so born during his life, without impeachment of waste; with remainder in trust for his first and other sons successively in tail male. The will contained a power for the trustees, at the request and by the direction of the person who should for the time being be entitled to the possession or to the receipt of the rents and profits of the hereditaments thereby devised, if of full age, but, if such person were a minor, at their own discretion, to sell all or any part of the hereditaments, except the mansion-house and park of *Beechwood* and lands lying within two miles of the park. The proceeds of sale were, if the trustees should think fit, to be applied, in the first place, in the discharge of incumbrances affecting the hereditaments devised or any part thereof, and subject thereto (but with such consent or at such discretion as aforesaid), the proceeds of sale were to be laid out in the purchase of freehold hereditaments in fee simple in possession, situate in the counties of *Hertford* or *Bedford*, to be settled upon the trusts declared by the will.

The testator died on the 28th of August, 1864, and the Applicant, who was his eldest son and heir-at-law, thereupon became Sir *John Sebright*. He was born in February, 1843. The testator left three other sons surviving him, who were born respectively in May, 1854; August, 1856; and March, 1859. Sir *John* married in March, 1865, and at the time when this summons was heard, he had only one child, viz., a son, born on the 12th of June, 1871.

The second of the testator's younger sons was married and had an infant son born in June, 1883. The other two younger sons of the testator were not married.

The estates settled by the will consisted of the *Beechwood* estate, situate in the counties of *Hertford* and *Bedford*; an estate in the county of *Worcester*; and some lands in *Shropshire* and *Surrey:* the annual value amounting in the whole to more than £13,000. Some small parts of the estates were sold by the trustees under the power of sale, and a sum of £6267 Consols, which

had arisen from those sales, was invested in their names. In 1884, the *Worcestershire* estates were sold under the provisions of the *Settled Land Act*.

At the time when this summons was heard, Sir *John* had created mortgages upon his life estate for sums amounting altogether to £130,000, and these sums were further secured by policies of insurance upon his life, the annual premiums upon which amounted to £3500. The inheritance of the settled estates was subject to a terminable annual charge of £178 19*s.* 11*d.*, which was charged on the *Beechwood* estate under the provisions of the *Improvement of Land Act*, 1864, and to annuities amounting to £950, which were charged on the estates by the testator's will. The net income of the settled estates (including the income produced by the £6267 Consols, but not including the income of the proceeds of the sale of the *Worcester* estates), after deducting the £1128 19*s.* 11*d.* (the amount of the annuities and the charge under the Act of 1864), was about £7663, which was less than the amount of the interest on the mortgages upon the life estate and the premiums on the policies. It was admitted that the object of the proposed sale was to increase the income of the tenant for life.

Under an order of *Pearson*, J., the infant tenant in tail appeared by his guardian in opposition to the summons. There was evidence on behalf of the Applicant that the estates which he intended to sell could be sold much more advantageously if the mansion-house and park were sold with them. This evidence was contradicted by evidence on behalf of the infant.

The mortgagees of the life estate had been asked whether they would consent to the proposed sale, and had declined to do so.

The summons came on for hearing before Mr. Justice *North* on the 27th of July, 1886.

Cookson, Q.C., and *Dauney*, for the summons:—

The policy of the Act is to place an absolute discretion in the tenant for life as to whether the bulk of settled land is to be sold: he cannot contract himself out of that right: sect. 50, sub-sect. 2(1).

(1) Sect. 2, sub-sect. 5. "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life,

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He has a right to exercise his discretion for his own benefit; if he thinks that, by getting rid of a place which is expensive to keep

is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Sub-sect. 7. "A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent."

Sect. 3. "A tenant for life—

(i.) "May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same."

Sect. 15. "Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court."

Sect. 20, sub-sect. 1. "On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement or, for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge."

Sub-sect. 2. "Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (*inter alia*)—

(i.) "All estates, interests, and charges having priority to the settlement; and

(ii.) "All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed."

Sect. 21. "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):" (*inter alia*)

(i.) "In investment on Government securities, or on other securities" as therein mentioned.

(ii.) "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land."

Sect. 22, sub-sect. 1. "Capital money arising under this Act shall, in

up, he can obtain an income which will enable him to live, he has a perfect right to exercise his power: *In re Brown's Will* (1).

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order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly."

Sub-sect. 5. "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

Sub-sect. 6. "The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement."

Sect. 34. "Where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be."

Sect. 50, sub-sect. 1. The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

Sub-sect. 2. "A contract by a tenant for life not to exercise any of his powers under this Act is void.

Sub-sect. 3. "But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

Sub-sect. 4. "This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section

(1) 27 Ch. D. 179.

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The power of sale given by the Act to the tenant for life is not affected by the fact that the whole of the income is absorbed in paying the interest of incumbrances on the estate: *In re Jones* (1).

If the rest of the property is to be sold, it is clearly for the benefit of all parties that the mansion-house and park should be sold also.

The mortgagees have not yet consented to the sale; they say, and they are entitled to say, "We will not make up our minds whether we will consent or not, until we know whether the whole property is to be sold, or whether the mansion and park are to be excluded."

Sub-sect. 3 of sect. 51 does not mean that a sale cannot be made without the consent of the mortgagees of the life estate; it merely means what it says, that their right will not be prejudiced by the sale—the money will be substituted for the land. The tenant for life cannot by express contract fetter his statutory power of sale, and he cannot do so indirectly.

Cozens-Hardy, Q.C., and *Morshead*, for the infant tenant in tail:—

The Act could not have intended that a tenant for life, who has assigned his whole life interest, should sell his life interest without the consent of his assignees. All that he could sell would be the reversion, in which he had no interest. If he can do this, he can create costs without any check, none of which he will have himself to pay.

The investment clauses, sects. 21, 22, are inconsistent with his being allowed to split the property into two—a life interest and a reversion—to sell the life interest outside the Act, to put the price in his pocket, and then sell the reversion, for, by sect. 22, sub-sect. 6, the price of what is sold under the Act has to be

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assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment."

Sect. 53. "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

(1) 26 Ch. D. 736.

invested, and the income applied in the same way as the income of the settled estate would be applied if it was not sold. He could get both the price of the life estate and the income of the capitalised reversion.

The sale of a reversion is always made at a disadvantage, and the Court will not assist the tenant for life in carrying out a transaction which would be injurious to the remaindermen for whom he is a trustee: sect. 53. He is bound to exercise his discretion for the benefit of his *cestui que trust*—the reversioner: *In re Knatchbull's Settled Estate* (1). This he has clearly not done in the present case. He ought not even to sell the property other than the mansion-house.

The Act only authorizes him to sell the whole settled estate of which he is tenant for life—that estate which is the subject of the settlement. He cannot sell subject to any charges which he has himself created in his own interest.

[NORTH, J., referred to sect. 34.]

That section contemplates the case of the settled estate itself being only a reversion, or a limited interest, such as a lease. But when the estate which is settled is an estate in fee in possession, the tenant for life can only sell an estate in possession.

Without the consent of the mortgagees the sale would be abortive, and the tenant for life is not entitled to throw the costs of an abortive sale on the *corpus*.

[NORTH, J., referred to sect. 20, sub-sect. 2.]

That is equivalent to the common form of a power of sale in a settlement. The power is to override everything, except estates created to raise money under the provisions of the settlement; it does not apply to an assignment made by the tenant for life of his own beneficial interest under the settlement.

The tenant for life has no longer any interest in the property, and the Court will not assist him in selling the mansion-house, but will leave him to sell the rest of the property, if he can. The Court has a discretion: *In re Duke of Marlborough's Settlement* (2). The settled estate itself is practically free from incumbrances; it is the interest of the tenant for life which is incumbered. If

(1) 27 Ch. D. 349, 352; 29 Ch. D. 588. (2) 32 Ch. D. 1, 4.

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the Court sanctioned the sale of the mansion-house, the purchaser would, by virtue of sect. 70 of the *Conveyancing Act*, 1881, obtain a statutory title, and the mortgagees might be left out in the cold.

E. Beaumont, for the trustees of the will, stated that they strongly objected to the proposed sale.

Cookson, in reply:—

The tenant for life is ready to undertake not to sell without first paying off the mortgagees or obtaining their consent in writing to the sale. The tenant for life cannot be prevented from selling the whole of the property, except the mansion-house and park, and it would be better for all parties that the mansion-house should be sold with the rest of the property.

Aug. 4. NORTH, J. (after stating the facts, continued):—

The income of the tenant for life is at the present time more than wholly swallowed up by the interest upon the mortgages of his life estate and the premiums, and there is nothing coming to him from the property; his life estate is exhausted. It is admitted that the object of this application is to increase his income; a perfectly legitimate object, if it can be accomplished without injuriously affecting the interests of the persons entitled in remainder.

Now the question turns upon the construction of certain clauses in the *Settled Land Act* of 1882, the object of which, no doubt, was to confer very large powers upon tenants for life for enabling them to obtain money. [His Lordship referred to sect. 3 of the Act; to sub-sects. 1, 2, and 4 of sect. 50, and to sub-sects. 5 and 7 of sect. 2, and continued:—] Pausing there for a moment, it might perhaps be said that, when a tenant for life has disposed of all his interest, he cannot sell the property, because he has no longer an interest, in it, and is not a person who ought to be trusted with the power of sale. Not having an interest in the property, he is not a person in whom a discretion can be reposed. That view, however, seems to me to be entirely disposed of by the Act itself, and I cannot say that, notwithstanding that the tenant for life

has parted with all his interest, he may not exercise his discretion and sell under the Act, although his interest is entirely gone. But sect. 21 provides what is to be done with the money arising from a sale under the Act; sub-sect. 2 says that the money may go "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land or, other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe . . . charged on or payable out of the settled land." That provides for the payment of incumbrances affecting the estate settled. The estate settled might be a reversion; there might be a paramount tenancy for life not in the settlement at all; or, again, the estate settled might be subject to a prior leasehold interest. Sect. 21 does not contemplate the discharge of incumbrances affecting less than the whole of the estate which is the subject of the settlement. Sub-sect. x. provides for the payment of costs out of the proceeds of sale.

Sect. 22 is important. It deals with the payment and investment of capital money arising under the Act; and sub-sect. 6 says: "The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement." Supposing, therefore, that the tenant for life had charged his whole life interest, then under those sections to which I have referred it might be that he could sell the whole of that which was capable of being sold, that is, the whole of the settled estate, and would be entitled to receive the whole of the income of the proceeds of sale. That would be rather a startling result, viz., that the tenant for life might sell his whole life estate and then sell that which was vested in somebody else, that is, practically, the reversion subject to his life interest, and receive the whole of the income of the proceeds of the sale of the reversion in addition to the value of his life interest which he had already received. It seems very improbable that this could have been intended. I have already read the 1st, 2nd, and 4th sub-sections of sect. 50, and I will now read sub-sect. 3, which is this: "But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his

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consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act." Then the 4th sub-section provides that the word "assignment" shall include, not only an absolute assignment, but an assignment by way of mortgage, and any partial or qualified assignment and any charge or incumbrance. Then sect. 20 provides for the way in which a sale by a tenant for life is to be carried out by conveyance, and it enacts (reading it shortly) that upon a sale the tenant for life may as regards the land sold convey the same by deed, for the estate or interest the subject of the settlement or for any less estate or interest. And sub-sect. 2 says: "Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges, subsisting or to arise thereunder, but subject to and with the exception of (I.), all estates, interests, and charges having priority to the settlement; and (II.) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed." Mr. *Cozens-Hardy* says that these words point to mortgages or charges which have been made for raising portions or other such things. I have no doubt they do, but it seems to me that they are not confined to that. I think the words include all estates and interests created subsequently to the settlement for the purpose of securing money, and that they therefore include a mortgage of his life interest made by the tenant for life for the purpose of raising money. Therefore, the conveyance by the tenant for life under the 20th section can only pass the estates subject to any charge by mortgage or otherwise of his life estate which has been made by the tenant for life for the purpose of raising money.

Under these circumstances it appears to me that the tenant for life can only convey under the Act so as not to affect the charges on the estate, including those charges or incumbrances on the

life estate which have been created by himself. When, therefore, his life estate is incumbered up to the hilt, he can only sell that which is practically a reversion, not an estate in possession.

Then sect. 53 seems to me not unimportant: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Several observations have been made from time to time upon that section by different Judges. I will refer first to what was said by Lord Justice *Cotton* in *In re Knatchbull's Settled Estate* (1). He said: "That the Act did not generally intend to interfere with existing rights, as between tenant for life and those entitled in remainder, is to my mind clear from the 53rd section of the Act. . . . The contention on the part of the Appellant is this, that under this Act the tenant for life may sell, he being at the time bound to pay the principal and interest on certain charges, and may apply the money which comes from the sale of the *corpus* in discharge of that liability, and throw the principal money entirely upon the *corpus*. Is that fair?" And then he gives reasons for thinking that it is not fair. Again, in *Cardigan* v. *Curzon-Howe* (2) Mr. Justice *Chitty* said (3): "I ought to add one word on sect. 53. The meaning of that section is that the tenant for life is, as the section states, to have regard to the interests of other persons, and he is to be deemed to be a trustee in the exercise of the powers for those persons. He is not to exercise this power simply for his own benefit. At the same time, I have always acted, and until I am better instructed shall act, on this view of sect. 53. I consider that the tenant for life has the absolute right to sell, though, it may be suggested, he is selling out of ill-will or caprice, or because he does not like the remainderman, because he desires to be relieved from the trouble of attending to the management of land, or from any other such object, or with any such motive. The object of the section is best seen by reading it in connection with sect. 54, and the result is that the tenant for life must pursue his powers

(1) 29 Ch. D. 591.
(2) 30 Ch. D. 531.
(3) 30 Ch. D. 539.

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according to the Act. He must sell for the best price, and if he does not, and there is any corrupt or underhand bargain between him and the purchaser, then neither is his sale good, nor does the purchaser obtain a good title. But if the matter of sale is carried forward in good faith, and the purchaser deals in good faith with the tenant for life, then his contract of sale and conveyance stand. Sect. 53 does not, to my mind, make the tenant for life trustee of his power within the scope of the declaration contained in the decree made before this Act came into operation, for the execution of the trusts under the settlement."

And in *In re Duke of Marlborough's Settlement* (1) Lord Justice *Lindley* (2) said: "As to sect. 53, the exercise of the powers under the statute will be valid, if the tenant for life acts honestly and *bonâ fide* and for the interests of those interested in the land, the tenant for life, the tenant in tail, and all who may come afterwards. No doubt, it is possible to conceive a case, in which a large sum of money, arising from the sale of the heirlooms, may go one way and the settled land another; but it is quite possible, on the other hand, that that case may never happen. I cannot say that it is a breach of trust to do that which is apparently for the benefit of everybody interested." That, therefore, seems to be the way in which the tenant for life, who is thus made a trustee, is to exercise his powers under the Act; he is to consider that he is acting for the benefit of all the parties interested, and not for himself alone. That would go very far to shew that a tenant for life, who was acting honestly and fairly in the due exercise of his powers under the Act, could not sell in this way—that is, sell first his own life interest and put the purchase-money into his pocket, and then sell the reversion which did not in any way belong to him, and put the whole income of the fund arising therefrom also into his pocket. But there is another section of the Act which seems to me to have a very important bearing on the question before me. I mean sect. 34. [His Lordship read sect. 34, and continued:—] That section seems to me to contemplate a case in which there may be a sale of a reversion under the Act, but then it directs that in such a case the income of the proceeds of sale is to be applied, or at any rate may be applied,

(1) 32 Ch. D. 1. (2) 32 Ch. D. 11.

by the Court or the trustees in a manner different from that which is indicated by sect. 22 (sub-s. 6), which directs that the income of the investments of capital moneys is to be paid to the tenant for life. In dealing, therefore, with the estate as a whole (not merely the mansion-house and the park), it seems to me that the Act does not necessarily forbid a sale by the tenant for life, although he may have mortgaged or parted with his whole interest. I do not decide this point now; the sole question before me is with regard to the sale of the mansion-house and park. I do not express any opinion as to whether the tenant for life, having parted with his whole life estate, can or cannot sell the rest of the settled estates under the Act. But it seems to me clear either that he cannot sell that which is in fact only a reversion, or, if he can sell it under the Act, it will be the duty of the trustees under sect. 34 to take care that the whole of the proceeds of sale are applied for the benefit of the persons interested in remainder. If that is done, the proceeds of sale would have to be applied in such way that the whole income would be accumulated, and not paid to the tenant for life, who has already the full benefit which the will confers upon him by means of the life interest which he has disposed of. Under these circumstances it seems to me that the actual condition of things has not yet been properly considered. The tenant for life is not, in my opinion, in a position to sell in such a way as to get the income of the proceeds of the sale. There is no doubt that his object in selling is entirely for his own benefit; he wishes to sell so as to increase his income. He has not exercised any discretion on the question whether the property should or should not be sold, independently of increasing his income by means of the sale. He has not considered that point at all. It seems to me, therefore, under present circumstances, that it is impossible to say whether it is desirable that the settled property other than the mansion-house and park should be sold. I am asked to sanction the sale of the mansion-house and park, and it is said that there is strong evidence to shew that it would be very much to the interest of all parties that the other estates should not be sold without the mansion-house and park, and that the mansion-house and park should not be sold without the other estates. I am told that

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there is some conflict of evidence upon that point, but I will assume for the present purpose that the evidence that it would be better that the whole of the estates should be sold together preponderates. I am asked to make an order for the sale of the mansion-house and park, conditionally upon the consent of the mortgagees of the life estate being obtained. I suggested that, before anything was done, the mortgagees (who, it is stated, would not consent to a sale) should be consulted, and the case stood over for this purpose. It now appears that the mortgagees will not consent to a sale. I am told that it is very reasonable that they should not consent now, and that it is very fair that, before exercising their discretion, they should know what is to be sold; that is, I suppose, whether the mansion-house is or is not to be sold with the other property, whether the property is to be sold in one lot or in several, and what the terms and conditions upon which the sale of the life interest, on which they have a security, is to take place. I daresay that is so, but it seems to me equally reasonable that I should be placed in the same position as the mortgagees. It is impossible for me to give my consent to the sale of the mansion-house before I know what is going to be sold; whether the other estates are to be sold with it or not. I cannot, therefore, at present accede to the application.

If it is not renewed by the 1st of December next the summons will be dismissed. The costs of all parties may be paid by the trustees out of any capital moneys in their hands.

W. L. C.

C. A.

From this decision Sir *John Sebright* appealed. The appeal was heard on the 11th of August, 1886.

Cookson, Q.C., and *Dauney*, in support of the appeal.

Cozens-Hardy, Q.C., and *Morshead*, for the remaindermen.

E. Beaumont, for the trustees.

The arguments were in substance the same as those addressed to the Court below.

COTTON, L.J. :—

In my opinion Mr. Justice *North* was quite right. I do not at all agree with the argument on behalf of the Appellant, that the only thing with which either the Court or the tenant for life or the trustees have to do, under sect. 15, is to consider whether the estate will sell better with than without the mansion-house. In my opinion a discretion is given to the Court to determine whether or no a mansion-house shall be sold, though the tenant for life can without the authority or leave of the Court sell the remainder of the estate. The point is whether, in the special circumstances of the case, the Court will authorize the sale of this mansion-house whether the mortgagees of the life estate do or do not consent. If there were no mortgagees the question whether the estate would really be more advantageously sold with the mansion-house might be a matter for consideration; but here there are mortgagees of the life estate, if not for the whole value certainly for a considerable portion of it, and they object to the sale. The object of the application is, that the estate may be sold as a whole, as a residential estate with the mansion-house upon it. If the mortgagees of the life estate will not consent to the sale of the mansion-house with the estate, so as to make it a residential property, then at any stage or at any moment they may come and say they want to take possession. I will assume for the purposes of my decision that it might be desirable to sell the estate as a whole with the mansion-house. But, before a sale of the mansion-house is authorized, I think it would be right for the Court to know whether the mortgagees consent or not, and to know the facts without a knowledge of which the mortgagees at present refuse their consent, and I should require to know these facts before deciding in the exercise of my discretion that the mansion-house should be sold. It is said that this tenant for life would be in a better position if the mansion-house is sold with the estate. The Court requires information, which must be given to it, and the tenant for life should consider whether it is worth his while to supply the Court with that information, which is necessary to enable the Court to decide whether it will give leave or not to sell the mansion-house. He should give the Court that information, and it is

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necessary that the Court should know whether the mortgagees consent. He must inquire into all that, and he must have that consent in order to obtain leave to sell the mansion-house, which cannot be done without the leave of the Court. Undoubtedly if there is no sale he will have to pay the expenses.

LINDLEY, L.J.:—

I also think that the order made by Mr. Justice *North* was a proper, a sensible, and a prudent order. The Court ought not to make an order of this kind in the dark. We are asked to make an order for a sale. Before doing that, we say let us see if the mortgagees consent. Here there are mortgagees with mortgages almost to the full value of the estate, and the Court must inquire whether they consent or not. In the meantime the Court declines to make the order.

LOPES, L.J.:—

When the *Settled Land Act* was introduced it made great changes, and gave certain powers to tenants for life to dispose of their property, and by sect. 15, which one is bound to think was most carefully framed, there is a discretion vested in the Court as to making an order for the sale of the mansion-house and lands usually occupied therewith. The effect of that section is, with respect to the mansion-house and park, to restrict the powers given to tenants for life. It says, in effect, that nothing in the Act is to authorize the sale of the mansion-house and park without the consent of the trustees of the settlement or the order of the Court. Now in the present case there are trustees, but they have not consented to this proposed sale. Sect. 50 of the Act is also material, because it provides that a tenant for life cannot divest himself of the powers conferred by the Act, but he may by assignment for value incapacitate himself from exercising those powers as against the assignee for value. In this case Sir *John Sebright* has mortgaged his life estate, and he now comes to the Court under the powers given to him by this Act for the purpose of selling the mansion-house and park without the consent of the trustees. The mortgagees are not willing to sell the estate as it is, for they say: "We do not know what price will be

got for it, and we do not know whether it will be desirable that the mansion-house should be sold. We do not know what the conditions of sale are and many other things connected with it, and therefore we decline to consent." Mr. Justice *North* said that as the mortgagees did not consent, and wished for more information, it was only reasonable that he should have more information before him. In point of fact it seems to me that Mr. Justice *North* was asked to order the sale of the mansion-house, not only whether the mortgagees would consent or not, but he was asked to make an order in advance without any positive information before him which would enable him to exercise a discretion, and without knowing whether any order he made might not turn out to be abortive. In these circumstances I think that he very properly refused to make that order.

The trustees to have their costs, but the remainderman not entitled to have his costs out of the estate.

Solicitors: *Kaye & Guedalla; Tylee, Wickham, Moberly & Tylee; Fladgate & Fladgate.*

F. G. A. W.

V.-C. B.
1886
June 25.

LHONEUX, LIMON & CO. *v.* HONG KONG AND SHANGHAI BANKING CORPORATION.

[1886 L. 1312.]

Practice—Writ of Summons—Foreign Corporation—London Agency—Service—Waiver.

In an action against a foreign bank, service of the writ of summons on the head manager of the *London* "Agency" of the bank—the agency being ostensibly and in fact a bank with the usual offices, managers, and staff of clerks—held to be good service on the Defendants:—

Held, also, that an application made by the Defendants for security for costs constituted a waiver of any objection as to service.

THIS was an action by the Plaintiffs, a firm carrying on a general banking and mercantile business at *Namur* in *Belgium*, against the Defendants, the *Hong Kong and Shanghai Banking Corporation, Limited*, for an account of the Defendants' dealings with consignments of produce entrusted by the Plaintiffs to the Defendants' branch at *Hiogo* in *Japan* as the Plaintiffs' agents, between the years 1878 and 1881; for damages for alleged breach of duty as agents in and about the care and custody of the said goods; and for money had and received by the Defendants for the use of the Plaintiffs. The Defendants, the bank, were incorporated under an ordinance of 1866 of the colony of *Hong Kong*, and carried on their business under that ordinance and a deed of settlement made in pursuance thereof, the head office, directorate, and secretary being at *Hong Kong*. The bank had branches and also agencies (as distinguished from "branches") in various parts of the world, one of its "agencies" being in *London*. By their ordinance the bank was prohibited from establishing a "branch" in *England* without the sanction of the Lords of the Treasury being first obtained; but there was no prohibition against their establishing an "agency." The *London* office or agency was at 31 *Lombard Street*, the business there being conducted by a manager, assisted by a sub-manager, cashiers, and a large staff of clerks, and the bank's name appearing on the door and windows of the office without any notification that the

business there carried on was an "agency." The cheques and letter-paper in use at the office were also headed with the name of the bank and the *London* address.

On the 28th of May, 1886, the writ in the action was served on the head manager, at 31 *Lombard Street*. The action now came on upon a motion by the Defendants "that the writ of summons and the service thereof might be set aside, the cause of action (if any) having arisen out of the jurisdiction of this Court, and the Defendant corporation having their head office and their working directorate in *Hong Kong* and an agency only in *London*, and the service of the writ of summons not having been on the head officer, clerk, treasurer, or secretary of the corporation," and for costs.

It appeared that on the 2nd of June, 1886, five days after service of the writ, the Defendants, by their *London* solicitor, took out a summons against the Plaintiffs for security for costs; that, on the following day they served the Plaintiffs with notice of the present motion; and that on the 11th of June they entered a conditional appearance to the writ.

Pollard, for the motion:—

Service on the head manager of the agency is bad, for Order IX., rule 8 (Rules of the Supreme Court, 1883), requires that service of a writ on a corporation should be effected on its "head officer." That cannot include the manager of a mere agency: *Nutter* v. *Messageries Maritimes de France* (Q. B. D. July 9, 1885, before Lord *Coleridge*, L.C.J., and *A. L. Smith*, J.) (1).

Northmore Lawrence, for the Plaintiffs:—

I submit that the head manager of the Defendants' *London* office is a "head officer" within the meaning of the rule. The *London* office is virtually, and to all outward appearance, a bank, and carrying on business as such, as the evidence shews. Although service on a mere agent of a foreign corporation may be insufficient, "it is different where the foreign corporation actually has a place of business and trades in this country:" *Newby* v. *Von*

(1) 1 Times L. R. 644.

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Oppen (1). That is the distinction between this case and *Nutter* v. *Messageries Maritimes de France* (2). There the foreign corporation had a mere collecting agent in this country without any place of business here. I submit, further, that the Defendants have in fact submitted to the jurisdiction by having applied for security for costs and by having served notice of the present motion.

Pollard, in reply:—

Newby v. *Von Oppen* (3) is questioned in *Mackereth* v. *Glasgow and South Western Railway Company* (4).

BACON, V.C.:—

To those who carry on mercantile business in the city of *London* the point of practice raised by this case is of considerable importance. That the Defendants carry on business in *London* is distinctly proved by the evidence. They hire an office, write up their name, and, beyond all question, stamp upon themselves and their place of business here the assumption that here they carry on their business. If I had any doubt about that part of the case, I should say that the application for security for costs amounted to a waiver of any objection that might be taken as to the service of the writ.

As to the merits of the case, I do not even glance at them, as I have not to deal with them on the present occasion. The affidavits shew clearly that the Defendants are carrying on a mercantile undertaking in *London*. In my opinion, there is no ground for the present application, and I therefore refuse it with costs.

Solicitors: *Ambrose Parsons; Hollams & Co.*

(1) Law Rep. 7 Q. B. 293, 295.
(2) 1 Times L. R. 644.
(3) Law Rep. 7 Q. B. 293.
(4) Ibid. 8 Ex. 141.

G. I. F. C.

In re WHITE'S TRUSTS.

V.-C. B.
1886
July 17.

Charity—Cy-près—Failure of Object—Lapsed Legacy.

A testator, a tinplate worker, bequeathed £1000 Consols to the Master, Wardens, &c., of the *Tinplate Workers Company*, upon trust with the proceeds when a proper site could be obtained to build in such part of *England* as they should think fit almshouses for the use, first, of poor liverymen of the company, then of poor freemen of the company, and lastly, of any poor men of the trade of a tinplate worker: and he declared that he had made the bequest in the hope that some other person, actuated by the same charitable feelings, would thereafter sufficiently endow the almshouses: and he bequeathed the residue of his estate to various persons.

After the testator's death the company unsuccessfully endeavoured to obtain a site for the almshouses, and it appeared that there was no reasonable prospect of a site being obtained, and that, even if it could be, the company had no income available for the endowment and maintenance of the almshouses:—

Held, that as the object of the gift had failed, the fund fell into the residue as a lapsed legacy, and was not applicable *cy-près*.

JOHN WHITE, tinplate worker and liveryman, of the city of *London*, by his will, dated the 30th of March, 1844, bequeathed to his executors £1000 Consols upon trust to pay the income to *Sarah Dale* for her life, and after her death the capital to sink into and form part of his residuary estate; and after numerous charitable and other bequests, he devised and bequeathed the residue of his estate to various persons therein named. By a codicil, dated the 20th of June, 1848, the testator revoked the bequest of the £1000 Consols after the death of *Sarah Dale*, and bequeathed the same after her death to the Master, Wardens, and Court of Assistants for the time being of the *Worshipful Company of Tinplate Workers* of the city of *London* and their successors for ever, upon trust, as soon as conveniently might be after his decease, and when a proper site could be obtained for that purpose, by and with the proceeds of the said sum of £1000 Consols, to erect and build in such part of *England* as they might think fit, being near to some principal market town, eight or more almshouses, with at least two rooms in each house, to be called "*White's Almshouses*," for the gratuitous use and occupa-

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tion, in the first place, of so many of the blind, helpless, or decayed liverymen of the said *Company of Tinplate Workers* of the age of fifty-five years and upwards, as should seek the benefit of the said charity, to be elected and chosen by the said Master, Wardens, and Court of Assistants for the time being, and if there should be no liverymen of the said company entitled to or seeking the benefits of the said charity, then, secondly, for the freemen of the said company of the age aforesaid who should come under the above denomination of blind, helpless, or decayed; and in case there should be no freemen of the said company entitled as aforesaid, then for any poor and decayed men of the trade of a tinplate worker, of the like age, to be elected and chosen as before mentioned. Nevertheless, he declared that if there should be any worthy person and object of the said charity under the age aforesaid, it should be in the discretion of the said Master, &c., to admit him to the benefits thereof if they should so think fit. Then followed directions as to the management of "the said charity," by the said Master, &c., and the testator concluded as follows:—"And I do also hereby declare that I have made the before mentioned bequest and disposition under the anxious hope and expectation that some other benevolent person or persons more wealthy than myself and actuated by the same charitable feelings, will hereafter sufficiently endow the said almshouses, so that the same may truly, under God's blessing, become not only the habitation and refuge, but support and comfort in their declining years, of those helpless persons for whom I have designed the same."

The testator died on the 5th of August, 1853, and shortly afterwards his executors transferred the £1000 Consols into Court under the *Trustee Relief Act* and the *Charitable Trusts Act*, 1853. *Sarah Dale*, the tenant for life, died on the 22nd of February, 1882, whereupon the *Tinplate Workers' Company*, acting under the direction of the Court, proceeded to make endeavours, by advertisement and otherwise, to obtain a site for the almshouses, but these endeavours proved unsuccessful, and there appeared to be no reasonable prospect of any such site being obtained. It appeared, moreover, that even if a site were obtained the company could not, having regard to their very small income (about

£60 a year) provide sufficient funds for the endowment and maintenance of the almshouses.

In these circumstances, the company communicated with the Charity Commissioners, who authorized them to apply to the Court for the transfer of the fund to the Official Trustees of Charitable Funds, in trust for the charitable purposes contemplated by the testator, and stated that after such transfer they would be prepared to consider an application for devoting the fund for the purpose of providing pensions to persons engaged in the trade of tinplate workers.

Accordingly the Master, &c., of the Company presented this petition asking that the fund in Court might be transferred to the account of the Official Trustees of Charitable Funds in trust for the charity created by the testator's codicil, in order that the Charity Commissioners might prepare a scheme for the application of the fund or of the dividends thereof in the payment of pensions to the poor members of the testator's trade who were then in receipt of small payments from the petitioners, and for the future regulation and management of the charity, or that a scheme might be settled by the Court. The main question was whether, the particular objects of the charity having failed, the gift had lapsed so that the fund belonged to the residuary legatees.

Millar, Q.C., and *Grosvenor Woods*, for the Petitioners:—

The testator has shewn a sufficiently "general charitable intent" to justify the Court in applying the fund *cy-près*.

Dibdin, for the Respondents, residuary legatees:—

I submit that this is not a charity at all, and that, even if it were, the *cy-près* doctrine does not apply to this case. This is not a gift for general charitable purposes but for the particular charitable purposes mentioned in the will, and no other. Unless a testator shews a general charitable intent overlying the particular charitable bequest, the *cy-près* doctrine is not applicable, the rule laid down by the authorities being that where the particular charitable object fails the gift cannot be applied *cy-près* but lapses: *Pease* v. *Pattinson* (1); *Clark* v. *Taylor* (2); *Russell*

(1) 32 Ch. D. 154. (2) 1 Drew. 642.

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v. *Kellett* (1); *Fisk* v. *Attorney-General* (2); *In re Ovey* (3); though the authorities appear to be questioned in *Jarman* on Wills (4). The Court will not hold a charitable fund for an indefinite time, or where there is no reasonable prospect of carrying the object of the gift into execution: *Sinnett* v. *Herbert* (5). Here, after the lapse of four years since the fund fell into possession, the Petitioners say they see no prospect of obtaining a site for these almshouses. I submit, therefore, that the gift has failed, and that the residuary legatees are entitled.

Millar, in reply:—

In nearly all the cases cited the charitable object had ceased to exist in the testator's lifetime. Here the object has not ceased to exist. The concluding declaration in the will shews a general overriding charitable intention to benefit the poorer members of the craft to which the testator himself belonged. This case is very similar to *Chamberlayne* v. *Brockett* (6), the form of decree in which is given in *Seton* on Decrees (7). We submit that, as in that case, a scheme should be directed for the application of the fund *cy-près* until land becomes available for the purpose of the gift. *Sinnett* v. *Herbert* shews that a charitable gift may be made for a future object not in existence at the testator's death. The fund might be directed to remain in Court for a reasonable time till it can be seen whether a site can be obtained: *Attorney-General* v. *Bishop of Chester* (8). We submit that the doctrine of *cy-près* does apply to this case, and that the fund is applicable for the relief either of poor freemen of the company or of poor members of the testator's craft or trade of a tin-plate worker; or it may be transferred to the Official Trustees of Charitable Funds under s. 51 of the *Charitable Trusts Act*, 1853.

Bacon, V.C.:—

The question, and the only question, before me, is whether the doctrine of *cy-près* is to be applied to this case. Some time has been occupied in discussion upon the subject, but I find, on

(1) 3 Sm. & Giff. 264.
(2) Law Rep. 4 Eq. 521.
(3) 29 Ch. D. 560.
(4) 4th Ed. pp. 247, 248.
(5) Law Rep. 7 Ch. 232.
(6) Ibid. 8 Ch. 206.
(7) 4th Ed. p. 585.
(8) 1 Bro. C. C. 444.

examining into the matter, that there is no ground upon which the doctrine of *cy-près* can be applied to this legacy. The rule stated in all the cases is that where there is a general gift to general purposes of charity, that gift may be sustained on the doctrine of *cy-près* although the particular objects fail or are no longer in existence. *Chamberlayne* v. *Brockett* (1) has been referred to as justifying the construction Mr. *Millar* sought to place upon this gift; but there the whole residue of the testatrix's estate was given for plain, general charitable purposes, and it would have been against reason and against all the decisions to say that such a bequest as there was in that case was invalid because no land had yet been obtained as indicated by the will. The judgment upon which Mr. *Millar* relied contains a plain and very distinct exposition of the law by Lord *Selborne*, who says that "if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." Words cannot be plainer than that.

Now, apply that to this case. The testator has given £1000 Consols to be applied in erecting almshouses on a site to be obtained for the purpose. It appears that no site can be obtained, and that even if it could be the £1000 is not enough for the purposes the testator has indicated. The persons who are to have the enjoyment of the charitable gift are relative to the original gift. The testator says:—"I will have almshouses erected when a site can be found, and if they are erected certain benefits are to follow." No land can be obtained, so they cannot be built. There is no person in existence to whom to apply the money. To apply it to poor tinplate workers is out of the question. But there are three or four clear and plain decisions on the point left untouched by *Chamberlayne* v. *Brockett* and remaining uncontradicted. They are decisions by Vice-Chancellor *Kindersley*, Vice-Chancellor *Stuart*, Lord *Hatherley*, when Vice-

(1) Law Rep. 8 Ch. 206, 211.

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Chancellor, and also after he became Lord Chancellor, all of which govern the case now before me. The case is purely and distinctly that of a lapsed legacy. In one of the cases the charitable institution indicated ceased to exist before the testator died; and in the other cases, to which I need not refer more particularly, there was no object of the gift to take. In the present case no person is in existence for whose benefit the gift can be applied. What, then, is to be done with the fund? First it was suggested that it should be handed over to needy tinplate workers. That is out of the question. Then it was suggested that it should be handed over to the Charity Trustees for general charitable purposes. But even if I were to give it to the Charity Trustees they could not buy land with it or apply it to the purposes expressed in the testator's will.

In my opinion the fund must be deemed to remain part of the testator's estate which he has left to be applied for purposes which it has become impossible to accomplish. The gift, therefore, has lapsed, and the fund goes to the residuary legatees. Why is this £1000 to be hung up for ever to be applied to objects which cannot be attained? It must be treated as part of the universal property of the testator. There can be no reasonable doubt that this is a charitable legacy, for the fund is directed to be applied in the erection of almshouses for the benefit of certain poor persons indicated, but these objects it is now impossible to accomplish. In my opinion the case is to be treated not simply as one to which the doctrine of *cy-près* does not apply, but as if it were an ordinary case of a lapsed legacy, there being no person in existence to take the benefit of it; and therefore it remains for the benefit of the persons interested in the testator's general estate.

Solicitors: *E. H. Burkitt: Elcum & Lemon.*

G. I. F. C.

V.-C. B.
1886
July 19.

In re MABERLY.
MABERLY *v.* MABERLY.

[1886 M. 1739.]

Will—Settlement—Trustees—Money to be laid out in the purchase of Land to be settled in Strict Settlement—Investment—Debentures or Debenture Stock—Local Authority—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 33—*Local Loans Act*, 1875 (38 & 39 *Vict. c.* 83), *s.* 27 [*Revised Ed. Statutes, vol. xvii., p.* 761].

A testator, having devised his real estate to *A.* for life with remainder to his issue in tail, gave his personal estate to trustees upon trust to convert the same into money, and to lay out the produce in the purchase of freehold lands in *Ireland* to be settled to uses corresponding with the limitations of the real estate.

Upon an originating summons by the trustees, one of whom was the tenant for life, for the direction of the Court, it appearing that Irish land was at present an unsafe investment:—

Held, that the trustees might defer purchasing Irish land until they could prudently do so, and might in the meantime invest the personal estate under the powers of sects. 21 and 33 of the *Settled Land Act*, 1882.

Trustees whose powers of investment are dependent on sect. 21 of the *Settled Land Act*, 1882, authorizing trustees to invest capital trust money in the debentures or debenture stock of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares," may not invest, under the powers of sect. 27 of the *Local Loans Act*, 1875, in debentures or debenture stock issued by a local authority under that Act, unless, *quære*, the local authority has for ten years paid a dividend.

Adjourned summons.

Colonel *William Leader Maberly*, who was the owner of estates in the counties of *Roscommon* and *Tipperary*, by his will, dated the 31st of May, 1876, after bequeathing an annuity of £50, gave, subject thereto, all his real estate to his brother, General *Evan Maberly*, for life, with remainder to his issue in tail male. And he gave all his personal estate to his executors, one of whom was his said brother, upon trust to convert the same into money and to lay out the produce in the purchase of freehold lands and hereditaments in *Ireland*, to be settled to uses corresponding with the limitations thereinbefore contained of his real estate. By two codicils the testator made sundry pecuniary bequests. The will and codicils contained no general investment clause.

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The testator died on the 6th of February, 1885. After the testator's death, a memorandum, signed by him but unattested, was found with his will and codicils, containing the following passage:—"I do not wish any change made in the investment of my personalties, but I beg my executors to be in no hurry in making any investment in land till they can thoroughly appreciate the effect of Mr. *Gladstone's* confiscatory measures. In spite of everything, I think land in *Ireland* will maintain its present value, as there is no country that can compete with it in its staple productions of oats, roots, and cattle. As to improvement, none can be expected; nobody will spend a shilling on it that he can help when he is to get no benefit from the outlay." This memorandum was dated the 1st of July, 1881, the *Land Law (Ireland) Act*, 1881, being at that time under discussion in Parliament.

At the time of his death the testator had, besides real estate in *Ireland*, personal estate of considerable value. Part of the outstanding personal estate his executors invested after his death in £3935 0*s.* 9*d.* *Liverpool* 3½ per cent. corporation stock. As all parties interested under the will were desirous, having regard to the disturbed condition of *Ireland*, that the testator's directions to invest in the purchase of Irish land should not be carried out, the executors and trustees resolved to seek the directions of the Court both upon this point, and also upon the question of the investment of the testator's personal estate.

This action was then commenced by originating summons by the executors against the remaindermen, the infant sons of General *Evan Maberly*, the action being also intitled in the matter of the *Settled Land Act*, 1882, for the determination of (among others) the following questions—(1.) Whether, having regard to the terms of the will and the memorandum, the Plaintiffs, as such executors and trustees as aforesaid, ought forthwith to convert the testator's personal estate into money and to lay out the produce in the purchase of lands in *Ireland*, or whether such conversion and investment ought to be delayed or postponed for any and what period; (2.) Whether any and which of the investments made by the Plaintiffs since the testator's death ought to be retained or realised; also (3) For the appointment of trustees under the *Settled Land Act*, 1882.

Upon the second question the only point of importance was whether, having regard to sect. 21 of the Act, the *Liverpool* corporation stock should be retained. It appeared that this stock had been raised by the corporation of *Liverpool* under the provisions of the *Local Loans Act*, 1875, which enables a local authority to raise a loan by the issue of debentures or debenture stock. Sect. 27 provides that "any trustees or other persons for the time being authorized or directed to invest any moneys in the debentures or debenture stock of any railway or other company shall, unless the contrary is provided by the instrument authorizing or directing such investment, have the same power of investing such moneys in any nominal debentures or nominal debenture stock issued under this Act as they have of investing such moneys in debentures or debenture stock of any railway or other company as aforesaid." Sect. 21 of the *Settled Land Act*, 1882, authorizes the investment of capital moneys in the hands of the trustees "on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in *Great Britain* or *Ireland*, incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares."

There was no evidence as to the date of issue of the *Liverpool* corporation stock, or as to how long the corporation had paid a dividend on it.

The summons was supported by affidavits by Irish land agents shewing that, owing to the depreciation in the value of land in *Ireland*, and the great difficulty in obtaining payment of rents, it was most undesirable to invest money in the purchase of land in *Ireland*.

On the summons coming before the Chief Clerk he made an order appointing trustees for the purposes of the *Settled Land Act*, but the remainder of the summons he adjourned into Court, and it now came on for hearing.

Sir *A. Watson*, Q.C., and *Hornell*, for the Plaintiffs, one of whom was the tenant for life:—

We ask your Lordship to relieve us from the necessity of purchasing land in *Ireland*, and to allow us to invest the moneys

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in our hands as capital moneys under the *Settled Land Act*, 1882, An order on the trustees to invest in land would be practically nugatory, because the tenant for life could immediately sell under the powers conferred by sect. 3. The powers of investment of capital and trust money are contained in sect. 21. Then sect. 33, which precisely meets this case, provides that "Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act." That section is intended to enable trustees, at the request of the tenant for life, to dispense with the purchase of land under the directions of the settlement, and to invest at once in the securities authorized by sect. 21: *In re Mackenzie's Trusts.* (1) With regard to retaining the existing investment in *Liverpool* corporation stock, this appears to be within sect. 27 of the *Local Loans Act*, 1875, the trustees being authorized by sect. 21 of the *Settled Land Act* to invest in railway debentures or debenture stock.

Clement H. Lindon, for the Defendants, the remaindermen.

BACON, V.C.:—

The case is clear upon the Act of Parliament. First of all the testator's will contains a clear direction to convert his personal estate into money and invest the proceeds in the purchase of freehold lands in *Ireland*. That is an absolute injunction. But I must apply to these trustees the ordinary rule of conduct, namely, that they must only act in the affairs of their trust as prudent men would act in their own affairs. Now the evidence is clear that it would be most imprudent and most improper, at all events at present, to invest a single shilling in Irish land. In my opinion the trustees must not invest in the purchase of land in *Ireland*, until as prudent men they find they can do so with safety. In the meantime they are at liberty to invest on the securities authorized by sect. 21 of the *Settled Land Act*.

(1) 23 Ch. D. 750.

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With regard to the question as to the retention of the *Liverpool* corporation stock, I do not think the trustees are assisted by sect. 27 of the *Local Loans Act*, 1875. That section gives trustees the same power of investing in debentures or debenture stock issued under the Act as they have of investing in debentures or debenture stock of any railway company. But the terms of sect. 21 of the *Settled Land Act*, are precise—that the debentures or debenture stock authorized for investment must be those of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares." If the trustees could shew that the *Liverpool* corporation have paid a dividend for ten years the investment in the stock issued by the corporation might perhaps be allowed; but I cannot at present say that the trustees are entitled to retain the stock. It must therefore be sold and the proceeds invested in securities expressly authorized by sect. 21 of the *Settled Land Act*.

Solicitors: *Freshfields & Williams.*

G. I. F. C.

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[1885 H. 2544.]

Foreign Loan—Foreign Government—English Agents—Bondholder—Coupon—Interest—Advertisement—Notice—Deduction for Foreign Tax—Debtor and Creditor—Future Debt—Fund in Hands of Agent for Payment in full—Revocation—Specific Appropriation—Trustee and Cestui que Trust.

The Defendants were the agents in *England* of the Egyptian Government for a public loan, and were also mortgagees for the bondholders of certain Egyptian State lands, the management of which was vested in Commissioners, the revenues of the lands being transmitted by the Commissioners to the Defendants for payment of the interest on the loan, and any deficiency being made up out of the general revenues of the Egyptian Government.

On the 12th of April, 1885, the Egyptian Government issued a decree that a tax of 5 per cent. should be retained out of the half-yearly interest payable on the 1st of June then next.

On the 20th of May, the Defendants, having received from the Commissioners a sum of money to meet the half-yearly interest, less the 5 per cent., published, with the authority of the Egyptian Government, an advertisement in the *Times* announcing that the interest due on the 1st of

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June would be paid by them, the Defendants, between the hours of eleven and two on that day, less the 5 per cent. On the 22nd of May, the Defendants issued a second advertisement, stating that, in consequence of fresh instructions from the Egyptian Government, the interest "would be paid in full." Prior to issuing that advertisement the Defendants had received from the Commissioners a further sum to enable the interest to be paid in full. On the 1st of June the Defendants issued a third advertisement, stating that, in accordance with further instructions from the Egyptian Government, the interest would be paid less the 5 per cent., "notwithstanding that the amount required to pay the same in full has been duly remitted by the Commissioners."

An action by a bondholder claiming payment by the Defendants of the interest in full on the ground that they were "trustees for the bondholders" of the revenues received by them, and that the money remitted to them for payment in full of the interest on the 1st of June had been "specifically appropriated" to that purpose, was dismissed without costs.

ON the 26th of October, 1878, the Khedive of *Egypt* issued a decree authorizing a loan for a nominal sum not exceeding £8,500,000 to be secured on property of the State (hereinafter called "the Domain Lands"), and decreeing that, in case the revenue of the property should not suffice to meet the amount required for the service of the loan, the deficiency would be covered by the general revenues of the Government; and the Council of Ministers was authorized to agree to and make, by the Finance Minister, a formal mortgage on the Domain Lands in favour of the contractors of the loan: and the formation of a commission to administer the said property was authorized, whose functions were stated to be, (*a*) to manage the property, (*b*) to collect the revenues, and (*c*) to remit all the net revenues to the contractors of the loan: and the Finance Minister was authorized to settle with the contractors the terms of the loan, and to arrange with respect to the application of the eventual surplus revenue of the said property.

On the 31st of October, 1878, an agreement was entered into between *Charles Rivers Wilson*, the Finance Minister of the Khedive, on behalf of the Government of the Khedive, of the first part, and the Defendants, *Rothschild & Sons*, and *Rothschild Frères* of *Paris*, of the second part, whereby in pursuance of the power conferred on him by the said decree, and as such Minister of Finance, *Wilson* agreed with the *Rothschilds* that the said loan should carry interest at 5 per cent. per annum, and should, with

the interest thereon, "be absolutely exempt from every deduction and abatement whatsoever in *Egypt*," and should be payable in gold: that the mortgage to be made in accordance with the said decree should be delivered to the *Rothschilds* as soon as the same had been duly perfected; and that any balance of interest which the revenues of the Domain Lands should be insufficient to meet should be paid out of the general revenues of the State. And it was also agreed that the Commissioners referred to in the said decree (hereinafter called "the Domain Commissioners") should, as and from the date thereof, be entitled to enter into possession of the Domain Lands and receive all revenue in respect thereof, and, after deducting expenses, should forthwith remit the balance of revenue so received to the Defendants in *London*; and that all moneys (other than proceeds of sale of the Domain Lands) which should be in the hands of the Defendants on the 31st of May or the 30th of November in any year on account of the said loan should, after providing for the payment of the interest payable on the then next 1st of June and 1st of December respectively, and for the interest which should be payable at the end of the then next succeeding half-year, be applied towards the redemption of the loan; and that all sums required to be paid out of the general revenue of the State as aforesaid should, fifteen days at least prior to the half-yearly day for payment of such interest, be remitted to the Defendants in *London*. And the *Rothschilds* agreed "to issue the said loan as agents and for account of the Egyptian Government, and after the issue of the loan to act as such agents for the payment of the coupons thereof" and for the redemption of the bonds in consideration of certain commissions therein specified.

The loan was offered for subscription on the 8th of November, 1878, under a prospectus issued in *England* by the Defendants and stating that scrip would be issued to be afterwards exchanged for bonds, and that such bonds, both principal and interest, would be payable in gold, free from all Egyptian taxes, at the office of the Defendants in *London*, the above mentioned decree being printed at length on the prospectus.

The whole of the loan was subscribed for and scrip in respect thereof was issued to the subscribers.

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By a document dated the 1st of February, 1879, and called the "General Bond," the Government of the Khedive, acting by *Wilson*, the Finance Minister, bound the general revenues of the Government, as therein mentioned, and agreed with the contractors that all the payments of interest and principal moneys stated or certified by the bonds to be issued according to the prospectus should be duly paid, according to the tenor thereof, and according to the conditions (among others) that the principal and interest moneys represented by the said bonds and the coupons should be payable in gold at the banking-houses of the contractors (meaning the *Rothschilds*) at *London* or *Paris*, and that the interest and principal of the loan should be payable in manner aforesaid without any deduction or abatement in respect of Egyptian taxes or duties thereon.

Contemporaneously with the issue of the general bond a mortgage of the same date was made by the Government of the Khedive to the *Rothschilds*, as contractors for the loan, whereby it was, in effect, provided that the Domain Commissioners should manage the estates (subject to the control of the Council of Ministers, as mentioned in the decree), and that the net revenues of the estates, after deduction of expenses, should be remitted to the Defendants in *London*, and that the moneys so remitted should be applied, first, in payment of the interest and service commission of the loan, and secondly, in payment of the principal thereof.

The definitive bonds securing the loan (called "Egyptian State Domain Mortgage Bonds") were all issued after the General Bond and mortgage, and each bond had indorsed on it a copy of the original decree in full and extracts from the General Bond.

To these bonds coupons were attached entitling the holder to payment of interest at 5 per cent. per annum on the amount of the bonds on the 1st of June and the 1st of December in every year.

From time to time the Defendants, as the agents in *London* of the Egyptian Government, applied the remittances sent them by the Domain Commissioners in payment of the interest on the bonds.

On the 12th of April, 1885, the Egyptian Government issued

a decree that a tax of 5 per cent. should be retained from the half-yearly interest payable on the 1st of June then next.

In May, 1885, the Domain Commissioners remitted to the Defendant a sum of money to meet the half-yearly interest on the 1st of June, 1885, less the 5 per cent., and on the 20th of May, with the authority of the Egyptian Government, the Defendants inserted the following advertisement in the *Times* of that day :—

"*Egyptian State Domain Mortgage Bonds.*—The dividend on these bonds, due on the 1st of June next, will be paid by Messrs. *N. M. Rothschild & Sons*, between the hours of eleven and two on that day, and on each succeeding day (Saturdays excepted), less 5 per cent. retained, as per decree of the Khedive of the 12th of April, 1885.

"An acknowledgment of the 5 per cent. retained will be issued on payment of the coupon.

"Printed forms to be applied for, and the coupons left three days for examination.

"*New Court, St. Swithin's Lane.*"

On the following day, May 21st, the Defendants received a telegram from the Domain Commissioners stating that in consequence of protests made by the consuls of the European Powers against the legality of the decree of the 12th of April, 1885, the amount retained would be restored, and announcing the remittance to the Defendants of £10,000 to enable them to pay the coupons in full. Thereupon the Defendants inserted the following advertisement in the *Times* of the next day, May 22nd :—

"*Egyptian State Domain Mortgage Bonds.*—Messrs. *N. M. Rothschild & Sons* beg to announce that in consequence of instructions just received from the Egyptian Government, the coupon due on the 1st of June next will be paid in full, without the deduction of the 5 per cent. tax, as previously announced.

"*New Court, St. Swithin's Lane.*
"21st May, 1885."

On the same 22nd of May, the Defendants wrote a letter to the Egyptian Minister of Finance informing him that, in pursuance of his first instructions, they had announced payment of the coupon with the reduction of 5 per cent., "but, as since that

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date a new decree has appeared revoking the first, we have issued a fresh notice by which we make known that the coupon will be paid integrally."

On the 29th of May the Egyptian Minister of Finance sent the Defendants the following telegram:—

"Please pay coupon Domain 1st June retaining 5 % accordance decree 12th April."

On the following day, the 30th of May, the Minister received the Defendants' letter of the 22nd of May, whereupon he at once telegraphed to them as follows: "Received your letter 22nd instant. No decree having appeared cancelling that of 12th April, I confirm you my telegram of yesterday and request you to pay coupon 1st June, retaining 5 per cent. accordance decree 12th April."

Accordingly the following advertisement appeared in the *Times* of the 1st of June:—

"*Egyptian State Domain Mortgage Bonds.*—Messrs. *N. M. Rothschild & Sons*, beg to notify that, in accordance with directions received from the Egyptian Government on the 30th May, the coupon due the 1st June, 1885, will be paid, less the 5 per cent. tax, notwithstanding that the amount required to pay the same in full has been duly remitted by the Domain Commissioners.

"*New Court, St. Swithin's Lane.*

"June 1, 1885."

The Plaintiff, who was the holder of £5000 mortgage bonds, duly presented to the Defendants his coupon which fell due on the 1st of June, amounting to £125, but the Defendants refused to pay the same in full, claiming to deduct and retain thereout, in accordance with their advertisement, a sum equal to five per cent. of the amount, besides income tax.

The Plaintiff then brought this action against the Defendants claiming, (1) the £125, less income tax; (2) interest on the £125 at 5 per cent. per annum until judgment; (3) a declaration of charge on the funds received by the Defendants from the Domain Commissioners for the payment of the coupons on the bonds, and satisfaction of the amount of the Plaintiff's coupons out of such

funds; and (4) an injunction to restrain the Defendants from parting with such funds except in payment of the coupons in full.

In his statement of claim the Plaintiff alleged that the mortgage of the Domain Lands was made to the *Rothschilds* and accepted by them respectively, "as trustees for and on behalf of the bondholders generally:" that the Defendants, the agents in *London* of the Egyptian Government for the purposes mentioned in the contract of the 31st of October, 1878, "were in fact, by virtue of the said mortgage, entitled to and received all the net revenues of the Domain Lands as trustees for the holders of the said bonds:" and that the Domain Commissioners, in accordance with the terms of the said mortgage, remitted to the Defendants a sum of money representing net revenues of the Domain Lands, and sufficient to pay the half-yearly interest on the 1st of June, 1885, in full, "and specifically appropriated the sum so remitted to the payment of the said interest, and the Defendants received and accepted such remittances for that and no other purpose."

In their statement of defence the Defendants denied that the mortgage was made to themselves and the *Paris* firm, or accepted by them or either of the firms, "as trustees for and on behalf of the bondholders generally. It was made to them as agents of the Egyptian Government, who had agreed to issue the loan under the said agreement of the 31st of October, 1878, and not otherwise." The Defendants also alleged that they had, as such agents, from time to time applied the remittances sent to them by the Domain Commissioners in the payment of the interest on the said bonds, "but it was not as trustees for the holders of the said bonds that the Defendants received, or were entitled to receive, the net revenues of the Domain Lands." They also denied that the moneys remitted to them by the Domain Commissioners for payment of the half-year's interest due on the 1st of June, 1885, were specifically appropriated by the Commissioners to the payment of such interest, and they alleged that "The Domain Commissioners were only agents of the Egyptian Government, and were not competent to make, nor did they make, any appropriation of the sum so remitted, nor was there in fact any specific appropriation of the said sum or any part thereof. The Defendants received and accepted the remittances for the

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purpose of paying the interest, but they held the same, until actual payment, subject to any instructions which might, from time to time, be given to them by the Egyptian Government. The net revenues of the Domain Lands have, ever since the issue of the loan, been insufficient to provide the amount of the interest, and much more than 5 per cent. of the sum remitted to the Defendants was derived from the general revenues of the Egyptian Government, and in no sense represented net revenues of the Domain Lands, and the remittance to this extent was wholly unconnected with the mortgage:" that the Egyptian Government were entitled to give directions not to pay the coupons in full, and the Defendants were entitled and bound to act upon them: that the rights of the Plaintiff and the other bondholders were governed by Egyptian law, and the deduction having been made according to Egyptian law, was binding upon them: and that the Defendants were only agents of the Egyptian Government, and had no personal interest in the subject-matter of the action. They also submitted that the Plaintiff's bonds were not enforceable in this country, and that the Court had no jurisdiction in the matter.

Issue having been joined, the action now came on for trial.

Hemming, Q.C., and *John Henderson*, for the Plaintiff:—

It is clear that if a man places money in the hands of an agent for payment of debts, and nothing more is done, he has power to revoke that authority to the agent; but that as soon as the agent communicates to one of the creditors that he has money in his hands for payment of that creditor's debt, the power of revocation, so far as that creditor is concerned, is gone: *Garrard* v. *Lord Lauderdale* (1); *Cosser* v. *Radford* (2); *Kirwan* v. *Daniel* (3); *Johns* v. *James* (4). So here, we submit that the moment the Defendants, as the agents of the debtors, the Egyptian Government, announced their intention of paying the interest in full, and, inferentially, that they had the money in their hands for the purpose, the power of the Egyptian Government to revoke their authority to the Defendants was gone. But the case goes

(1) 2 Russ. & My. 451.
(2) 1 D. J. & S. 585.
(3) 5 Hare, 493.
(4) 8 Ch. D. 744.

further than one of agency, for, besides being agents for the debtors, the Defendants are also creditors and mortgagees under a document which creates a security both for themselves and for the other creditors—the bondholders; and it is clear from the authorities that where the agent is also a creditor the debtor cannot revoke the mandate. Even if the Defendants were merely agents, a trust in favour of the bondholders attached to the money in their hands as from the date of the notice that the interest would be paid in full; it was "money had and received" by the Defendants for the use of the bondholders: *Lilly* v. *Hays* (1), following *Williams* v. *Everett* (2).

Sir *H. James*, Q.C., *Marten*, Q.C., and *Maidlow*, for the Defendants:—

The money in question was remitted by the Domain Commissioners, not by the Egyptian Government.

We are mere agents of the Egyptian Government, and the money was received by us in no other capacity than that of such agents. We have never exercised any rights under the mortgage deed, and the only parties who are in possession of the mortgaged lands are the Domain Commissioners. Our duty was towards the Egyptian Government: we owed none to the Domain Commissioners. The interests of the Government and the Commissioners were, in fact, opposed to one another; the interest of the Government being to provide for the requirements of the internal administration of the country, while that of the Commissioners was to pay the foreign creditors.

We were bound to fulfil our duty to our principals, and to make the deduction when ordered by them to do so.

We have not ear-marked any part of the fund by entering into any contract with the bond-holders with regard to it. The advertisement of the 22nd of May, relied on by the Plaintiff, contained no statement that we have any particular fund for payment of the interest, or that there is any appropriation of any part of it to any particular creditor; nor is there any contract in it to pay out of our own funds. It is deficient in the ingredients constituting an act of appropriation for a specific purpose. An agent holding

(1) 5 A. & E. 548. (2) 14 East, 582, 597.

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money of his principal is not liable unless he has performed some act of appropriation, or unless he is estopped by conduct from denying appropriation. The principle is, that if a debtor tells his creditor that he may look to certain specified property for payment of his demand, the creditor acquires the position of *cestui que trust*, and a right as such to that property: *Synnot* v. *Simpson* (1) that is to say, to entitle a creditor to stand in that position there must be an appropriation. Here there is no reference in the advertisement of the 22nd of May to any property or fund. This is virtually a common law action for money had and received, in which the Plaintiff must shew that the money has been had and received for his use; but the advertisement contains no acknowledgment of that kind: it is a simple announcement of the intention to pay. Then, on the 1st of June, before any coupon is payable, and before the Plaintiff has altered his position, or done anything on the faith of the advertisement, we correct that advertisement by another, upon the instructions of our principals, as we were not only entitled but bound to do.

Hemming, in reply:—

The question of trust or no trust does not depend upon the manner in which the creditor deals or abstains from dealing with the money after he receives notice that the agent of the debtor has money in his hands for the payment of the debt. The advertisement of the 22nd of May was just as much an appropriation as if it had specified that the Defendants had the money in their hands for payment of the interest, for every bond-holder seeing the advertisement would know it meant that the Defendants had the money for the purpose, and it was, in fact, intended as an intimation to the bond-holders that the money was ready. I rely on the law as laid down by *Garrard* v. *Lord Lauderdale* (2), which was approved of in *Synnot* v. *Simpson*. The real question is, did not the Defendants receive money from their principals, the debtors, to pay the creditors?

[BACON, V.C.:—There was no debt due till the 1st of June. The Defendants said: "When the 1st of June comes, we mean to pay you at a certain time on that day;" but before the time comes

(1) 5 H. L. C. 121, 138. (2) 2 Russ. & My. 451.

they say: "We have been told by the owners of the money not to pay you, and we won't pay you."]

But the moment they announced "We will pay you" the power of the Egyptian Government or the Commissioners to revoke the authority was gone, and the trust had fastened on the money.

BACON, V.C.:—

With regard to the point of law I am called upon to decide, no one will dispute the law laid down by *Garrard* v. *Lord Lauderdale* (1) and that class of cases. No one will doubt that a man who gives an order to his agent to pay a creditor can afterwards revoke that order. There is another class of cases where there has been an accomplished fact—where money has been placed in the hands of a stakeholder or trustee for payment of an existing debt, and the stakeholder or trustee informs the creditor that he has the money in his hands for payment of that debt. That is irrevocable. Now, in which class of cases is this case to be reckoned? Here a sum of money came, as a matter of financial business, into the hands of Messrs. *Rothschild* to meet a coupon which would become due on the 1st of June, 1885. To pay that interest the Domain Commissioners remitted as much money as they could. Entertaining no doubt that on the 1st of June they would pay it, Messrs. *Rothschild* inserted an advertisement in the newspapers that they would pay it, but deducting the 5 per cent. pursuant to the decree of the 12th of April. Then, on the 22nd of May they expressed their intention of paying it without the deduction. Now, that interest was then a debt which would become due on a future day. Can it be said that a debtor who owes a sum of money, and remits it to an agent for payment on a certain day, has not the power, before that day comes, to order the agent not to pay it? Can it be said that the creditor has any actual right or interest in the money in the hands of the agent before the day of payment arrives? I say there is no ground for such a contention. It is said that this is an action for money had and received; but an action for money had and received is only maintainable when the money has been had and received to the use of the Plaintiff. Nobody can say that anyone except the Egyptian Government had any right to the money in the hands of their agents. Before

(1) 2 Russ. & My. 451.

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the day of payment came Messrs. *Rothschild* had money in their hands for payment of the interest, less the deduction of 5 per cent.—money to which £10,000 was afterwards added for payment without the deduction, according to the advertisement of the 22nd of May; but on the 29th of May came a telegram, confirmed by another telegram on the 30th, requesting Messrs. *Rothschild* to retain the 5 per cent. I am now dealing with the money which was in the hands of Messrs. *Rothschild* on the 22nd of May, the date of the advertisement which has been so much discussed—money which was subject to directions from the only persons who could give directions relating to it—namely, the Egyptian Government. But before the day came upon which Messrs. *Rothschild* could perform their first instructions, the owners of the money said: "Retain 5 per cent out of the money." It is in vain to ransack the books for authorities on the present case. It cannot be said that Messrs. *Rothschild* took any burden on themselves by their announcement by the advertisement of the 22nd of May of their intention to pay. There are no elements of contract in the case. They have simply performed their duties as agents. They are in no sense partners in the loan, though if they have any interest in the matter, it is that the loan should be paid. It is said that having taken upon themselves the duty of applying the money in their hands for payment of the coupon they are not at liberty to dispose of it in any other way; but the instructions received by them through the telegram of the 29th of May were precise, and it referred especially to the decree of the 12th of April. Whether the Egyptian Government were right in passing that decree for the retention of the tax, or whether, upon the construction of that decree, the Egyptian Government were entitled to do that which they did, namely, deduct a portion of the interest on the loan, is no part of the present litigation. In my opinion I can make no such order as is now asked. Whether the revocation was according to Egyptian law is not the question. That there was a revocation *de facto* I can entertain no doubt—a revocation made *primâ facie* by persons entitled to do so.

The only order I can make is for payment of the £125, less the 5 per cent. tax. I make no order as to costs.

Solicitors: *A. R. & H. Steele; Dawes & Son.*

G. I. F. C.

GREENWOOD *v.* HORNSEY.

V.-C. B.

1886

[1885 G. 1847.]

June 28, 29, 30; *July* 1, 6, 7, 24.

Easement — Light — Ancient Lights — Obstruction—Alteration of Dominant Tenement —Abandonment — Injunction or Damages—Undertaking—Discretion of Court—Lord Cairns' Act (21 & 22 *Vict. c.* 27) *s.* 2 [*Revised Ed. Statutes, vol. xiii., p.* 268]—*Prescription Act* (2 & 3 *Will.* 4, *c.* 71) [*Revised Ed. Statutes, vol. vii., p.* 223].

The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right, under the *Prescription Act* (2 & 3 Will. 4, c. 71), to the access and use of light to and for any building which may be substituted for the original building: the intention to abandon the right must be clearly established by evidence.

The nature of the statutory right to the access of light discussed.

Scott v. *Pape* (1) considered.

The discretion given to the Court by sect. 2 of *Lord Cairns' Act* (21 & 22 Vict. c. 27), to award damages in substitution for an injunction in the case of a substantial interference with a plaintiff's ancient lights, is a discretion to be exercised according to the facts of each particular case. Where the Plaintiff has, at the trial, established his statutory right as against a Defendant who has erected a building causing a substantial interference with that right, the Court will not compel him to accept damages or compensation instead of an injunction, especially where the Defendant has, during the progress of the action, given an undertaking to pull down, if so ordered at the trial.

Holland v. *Worley* (2) not followed.

THE Plaintiff was the lessee for a term of eighty years of certain workshops situate at the rear of 79, *Curtain Road*, in the parish of *St. Leonard, Shoreditch*. The workshops were erected in 1872 upon the site of some old buildings which fronted south upon a yard opening out of *Curtain Road*. These old buildings, which were pulled down in 1871, contained, as the Plaintiff alleged, several ancient lights. In the new buildings the windows were, it was proved, so arranged as to preserve the light which had been enjoyed in respect of the old buildings. The new buildings were somewhat higher than the old, and had an additional storey. The front was also advanced two feet into the yard. On the opposite side of the yard was a boundary wall

(1) 31 Ch. D. 554. (2) 26 Ch. D. 578.

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standing on and separating the yard from the Defendant's land, on which cottages formerly stood.

The Defendant, having pulled down his cottages, commenced erecting a large building on his land and raising the height of the boundary wall, which was intended to form part of his new building. Thereupon, on the 18th of August, 1885, the Plaintiff commenced this action, claiming an injunction to restrain the Defendant from proceeding with the erection of the building in such a way as to interfere with and obstruct the access of light and air to his, the Plaintiff's, windows and workshops, or from diminishing the access of light and air thereto.

On the 8th of September, 1885, the Plaintiff moved for an injunction, but the Defendant, desiring to proceed with his building, gave an undertaking, by counsel, to pull down any building thereafter erected or proceeded with, if so ordered by the Court, and to abide by any order as to damages: accordingly no order was made upon the motion except that the costs were to be costs in the action.

At that time the wall fronting the yard, which was formerly the boundary wall, was about twenty-three feet in height. The Defendant then proceeded with his building, and completed it in November following, his wall having been raised to a total height of about fifty-three feet.

On the 13th of November, the Plaintiff delivered his statement of claim, in which, after stating that since the issue of the writ the Defendant had completed his building whereby the light coming through his, the Plaintiff's, windows was seriously diminished, he claimed an injunction to restrain the Defendant from permitting his building to remain so as to obstruct or diminish the access of light, and damages.

By his defence the Defendant denied that the Plaintiff's lights were ancient, and asserted that, even if they were, they would not be materially or at all diminished by his building.

Issue having been joined, the action now came on for trial.

The existence of the ancient lights was, his Lordship held, clearly proved by the Plaintiff's witnesses: and it was also proved that the increased height of the Defendant's wall caused a substantial interference with those lights.

The main question of interest in the case was whether, in case of a substantial, though not an absolute, interference with a plaintiff's ancient lights, the Court will, in exercise of the discretion given to it by sect. 2 of *Lord Cairns' Act*, 21 & 22 Vict. c. 27, award damages in lieu of granting an injunction.

From the Defendant's evidence it appeared that the cost of the erection of his new buildings had been a little under £6000, while on the part of the Plaintiff, the diminution in value caused by the Defendant's building to the Plaintiff's property was estimated at about £600.

Marten, Q.C., *E. Cutler*, and *T. H. Dolbey*, for the Plaintiff:—

The mere alteration of the position or window-space of ancient lights, or the advancing or setting back of the original line of frontage, is not sufficient to destroy the right to the access of light and air which has for the statutory period passed over the servient to the dominant tenement, or to indicate the abandonment of that right: *Tapling* v. *Jones* (1); *Newson* v. *Pender* (2); *Scott* v. *Pape* (3); *Barnes* v. *Loach* (4); *Bullers* v. *Dickinson* (5).

Millar, Q.C., and *Lewis Coward*, for the Defendant:—

We do not admit the existence of the ancient lights; but we submit that, whatever rights the Plaintiff formerly had, there has been such a substantial alteration in the dominant tenement as to shew an absence of intention to preserve those former rights: *Fowlers* v. *Walker* (6). Even assuming that the Plaintiff's rights have been established by the evidence, it is not a case for an injunction, having regard to the fact that the effect of the Defendant's new buildings is not to render the Plaintiff's building absolutely useless but only to cause some diminution in value. In such a case the Court should award damages in lieu of an injunction under the discretion given to it by sect. 2 of *Lord Cairns' Act*, 21 & 22 Vict. c. 27, which says that: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . . it shall be lawful for the

(1) 11 H. L. C. 290.
(2) 27 Ch. D. 43.
(3) 31 Ch. D. 554.
(4) 4 Q. B. D. 494.
(5) 29 Ch. D. 155.
(6) 51 L. J. (Ch.) 443.

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same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction:" *Holland* v. *Worley* (1).

Marten, in reply:—

The power given by *Lord Cairns' Act* is a mere matter of discretion to be exercised by the Judge in each individual case. I submit that your Lordship ought not to follow Mr. Justice *Pearson's* decision in *Holland* v. *Worley*, the effect of which is to enforce upon a plaintiff a compulsory sale of that which is his "property," and as such entitled to protection: *Theed* v. *Debenham* (2); *Martin* v. *Headon* (3); *Dent* v. *Auction Mart Company* (4); *Aynsley* v. *Glover* (5); and *Smith* v. *Smith* (6). It has been expressly decided by the Court of Appeal, affirming *Jessel*, M.R., that where a Plaintiff has established his right to a perpetual injunction the Court has no power under *Lord Cairns' Act* to oblige him against his will to accept damages in lieu of an injunction: *Krehl* v. *Burrell* (7); *Gaskin* v. *Balls* (8). The important distinction between this case and *Holland* v. *Worley* is that here the Defendant, on the motion for an injunction, gave an undertaking to pull down if so ordered by the Court. He therefore proceeded with his building at his peril, and cannot now say that a mandatory injunction should not be granted.

1886. July 24. BACON, V.C. (after detailing the facts of the case, held, upon the evidence, that the Plaintiff had established his right to his ancient lights, and had shewn that the windows in the new building had been so arranged as to preserve the light which had been enjoyed in respect of the old buildings: also that the Defendant's new buildings had had the effect of materially diminishing the light received through the windows of the Plaintiff's old building before the erection of the Defendant's new building. His Lordship then proceeded as follows):—

It has been argued on the Defendant's behalf that the Plaintiff

(1) 26 Ch. D. 578.
(2) 2 Ch. D. 165, 169.
(3) Law Rep. 2 Eq. 425, 434.
(4) Ibid. 238, 246.
(5) Law Rep. 18 Eq. 544, 552; 10 Ch. 283.
(6) Ibid. 20 Eq. 500, 504.
(7) 11 Ch. D. 146; 7 Ch. D. 551.
(8) 13 Ch. D. 324.

has failed to shew the existence of the ancient lights in respect of which he sues, and, further, that the removal of his old building, in the manner proved, amounted to an abandonment of such lights, if they had ever existed. The first topic I have disposed of, and as for the second, I think there is no reasonable ground upon which it can be supported. It would be impossible to believe, having regard to the subject-matter and all its incidents, that the Plaintiff could have had any intention of relinquishing that access of light which was indispensably necessary to the use and enjoyment of his property.

Whatever may appear to have been the law previous to the case of *Tapling* v. *Jones* (1), it can no longer be said to be the law that the alteration of a building entitled to the access of light is an abandonment of the right unless the intention to abandon is manifest; and here, as I have said, no such intention is manifest, nor can it in reason be inferred.

In the recent case of *Scott* v. *Pape* (2), which was first discussed before Mr. Justice *North*, and afterwards in the Court of Appeal, and in which all the authorities pertinent to the question were examined and considered, the law was clearly stated and determined. It was there held that the right acquired under the statute 2 & 3 Will. 4, c. 71, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement.

The observations of the learned Judges in that case in fact dispose of all the topics which have been introduced in the argument before me. They decide in terms unmistakable that the right mentioned in the statute means the right to the same access and use of light in the whole or in part to and for any building; that what the dominant owner is entitled to is not the window but the free access of such an amount of light as has passed through that window; that alteration of the building has nothing to do with the question; and that there could be no abandonment where there existed an intention to use all the light which the old windows were entitled to use.

Upon the facts proved, and upon the principle of law applicable

(1) 11 H. L. C. 290. (2) 31 Ch. D. 554.

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to these facts, I am of opinion that the Plaintiff, at the time of bringing this action, was entitled to the injunction he then moved for. Matters, however, have very materially changed since that time. On the Plaintiff's motion for injunction the Defendant not only disputed his right, but desired at all events to continue his building then in progress; thereupon he gave by counsel an undertaking to pull down his building if ordered to do so by the Court, and to abide by any order as to damages.

The Defendant's building has since been completed, and from a height of about twenty-three feet, as it stood when the order was made, it has been raised to and stands at the height of fifty-two or fifty-three feet.

At the conclusion of the arguments of the Defendant's counsel on the issues raised, it was further contended by them that, even if the Plaintiff's case should in the judgment of the Court be established, it would not be right that any injunction should be granted, but that the Court should exercise the discretion conferred by the statute 21 & 22 Vict. c. 27, usually here called *Lord Cairns' Act*, and assess, or order an inquiry as to, the amount of damage the Plaintiff has sustained in consequence of the Defendant's building. The diminution in value of the Plaintiff's property was stated by a witness to be not more than about £600, while the Defendant's surveyor stated that between £7000 and £8000 had been expended on the Defendant's building, the Defendant, however, stating the cost had been a little less than £6000. In support of the proposition by the Defendant's counsel, reference was made to a case of *Holland* v. *Worley* (1) before the late Mr. Justice *Pearson*, in which that lamented Judge exercised the discretion vested in him by *Lord Cairns' Act*, by granting to the Plaintiff £150 as the proper compensation to be paid to the Plaintiff by the Defendant, instead of the injunction which the Plaintiff sued for. I have no right and certainly no inclination to criticise the judgment thus referred to; but it must be observed that there was no such undertaking as that which has been given by the Defendant in this case. The question there was —as such a question always must be—one of mere discretion; and the exercise of that discretion must be made with an intimate

(1) 26 Ch. D. 578.

knowledge of the facts of each particular case. I think I should err in principle and I should disregard the decisions and reasons expressed by the late Master of the Rolls in *Aynsley* v. *Glover* (1) and in *Krehl* v. *Burrell* (2), if I undertook to say that I have authority to grant or to sell to the Defendant, against the will of the Plaintiff, a license to commit that wrong of which the Plaintiff complains in consideration of any money payment. On the contrary, I am bound to say, as was said in *Scott* v. *Pape* (3), the way in which the case has been dealt with on the motion precludes me from entering into that question.

I am, therefore, compelled to decide, for the reasons I have stated and upon the evidence to which I have referred, that the Plaintiff is entitled to the injunction he claims, and that the Defendant must be restrained from permitting any part of his building to remain so as to interfere with or obstruct the access of light to the windows of the Plaintiff's workshops or from diminishing the access of light thereto, and that the Defendant must be ordered to pay to the Plaintiff the costs of the action.

Solicitors: *R. Jennings; Potter, Sandford, & Kilvington.*

G. I. F. C.

In re LEAF, SONS & CO.'S TRADE-MARK.

Trade-mark—Registration—"Fancy Word"—"Electric"—Patents, Designs, and Trade-marks Act, 1883, *s.* 64, *sub-s.* 1 (*c*)—*Costs—Comptroller—Unsuccessful Opposition.*

"*Electric Velveteen*," *held*, entitled to registration as a trade-mark under the *Patents, Designs, and Trade-marks Act*, 1883, "*Electric*" being a "fancy word" within sect. 64, sub-sect. 1 (*c*), and having acquired an exclusive reputation in the trade prior to the Act.

Where the Comptroller-General of Patents unsuccessfully opposes an application for registration, the Court has no jurisdiction to order him to pay the costs of the applicant, but in the present case it refused to give him any costs.

MESSRS. *LEAF, SONS & CO.* had for forty years carried on business as warehousemen and sellers of cotton velvets and

(1) Law Rep. 18 Eq. 544. (2) 7 Ch. D. 551; 11 Ch. D. 146.
(3) 31 Ch. D. 554.

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velveteens at *Old Change*, in the city of *London*. In 1878 they adopted the word "*Electric*" in connection with their velvets and velveteens, and it was proved that their goods had since become exclusively known in the market under the trade name of "*Electric Velvets and Velveteens*." In February, 1886, Messrs. *Leaf* applied, under the *Patents, Designs, and Trade-marks Act*, 1883, for the registration of the words "*Electric Velveteen*" in class 24 (cotton piece goods) in respect of velvets and velveteens, but the Comptroller refused to register the words except under an order of the Court. Messrs. *Leaf* accordingly now moved that the Comptroller might be ordered to proceed with the registration.

Aston, Q.C., and *Sebastian*, for the motion :—

We submit we are entitled to have the word "*Electric*" registered under sects. 64 and 74 of the *Patents, Designs, and Trade-marks Act*, 1883, as a "fancy word not in common use in the trade," the case being virtually governed by the recent decision of Mr. Justice *Chitty* in *In re Trade-mark* "*Alpine*" (1), and of your Lordship in *In re Van Duzer's Trade-mark* ("*Melrose*") (2). It is impossible to say that the word is descriptive of quality. If this application is successful, we submit the Comptroller should be ordered to pay our costs, having regard to the fact that this case is already covered by the two decisions above referred to.

The Court will give costs against the Comptroller where he acts wrongly in objecting to an application for registration: *In re Patent Plumbago Crucible Company* (3). The intention of the Legislature in passing the new Act was to provide a cheap and easy mode of obtaining registration, and that the costs should be as small as possible, a scale of costs being given in the 1st schedule to the Trade-marks Rules, 1883, issued under the Act. There is no clause in the Act requiring that the costs of a successful application to the Court shall be paid by the applicant, and the question of costs thus remains in the discretion of the Court. It is not fair that an applicant should have thrown upon him the burden of paying the costs of an unjustifiable opposi-

(1) 29 Ch. D. 877. (2) W. N. 1886, p. 135.
(3) *Sebastian* on Trade-marks, 2nd Ed. p. 223.

tion. The costs of registration, except such costs as are stated in the 1st schedule to the Rules, ought to be thrown upon the office, which has ample funds available for that purpose; for, according to the annual statement issued by the Patent Office for the year 1885, the total sum received from applicants in the shape of fees amounted to no less than £88,000, of which, after payment of the expenses of the office, a surplus of £10,000 went to the Treasury.

Ingle Joyce, for the Comptroller:—

I submit that "*Electric*" is not a "fancy word" within the meaning of sect. 64. It is a well-known dictionary word, defined in *Ogilvie's* Comprehensive General Dictionary as "containing electricity, or capable of exhibiting it when excited by friction," the word thus being merely descriptive. This case differs from the two cited, for there the words were geographical. Upon the question of costs the Board of Trade has never been ordered to pay costs, there being no jurisdiction to make such an order nor any fund to answer costs: *In re Rotherham's Trade-mark* (1). The Comptroller only desires the guidance of the Court to enable him to perform his duty in an impartial manner and in the interests of the public. Communications daily reach the office from various Chambers of Commerce and business people throughout the country complaining of the registration of names like this.

BACON, V.C.:—

I cannot but express my surprise that this question should be raised, because I cannot conceive for a moment upon what ground these applicants, who for nearly ten years have been in the habit of selling under a particular name the commodity they deal in, should be prevented from registering that particular name, now that the statute has said what it has said in the 64th section as to a "fancy word." Can anybody doubt that "*Electric*" in connection with velveteen is a purely "fancy word?" Does it describe any real quality? Nobody can say it does. It is purely fancy, as much fancy as "*Eureka*" is in relation to a shirt.

(1) 14 Ch. D. 585.

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What connection is there between "*Eureka*" and a shirt? "*Eureka*" was a good fancy name. For nearly ten years these people have called their commodity "*Electric*" velveteen, and now they are told they shall not have the protection provided by the law in order to secure their particular property, because their appellation is not a fancy one. I say unquestionably this is nothing but a fancy word. It has no connection but through the fancy with velveteen. Whether velveteen is made of silk, or wool, or anything else, "*Electric*" as a definition of quality has nothing to do with the goods; but it is a word constituting that which, in all times I believe, and in all countries, merchants have been in the habit of applying, and have acquired a lawful right to apply, to the commodity they deal in, namely, a distinctive name or mark.

Now here, supposing somebody wants to buy velveteen from the present applicants, and he goes to their warehouse, they say to him, "What do you want?" he replies, "I want your '*Electric*' velveteen, the thing you and I know very well, which you have often sold to me, and I have often bought." They then pull down the parcel labelled "*Electric Velveteen*," and say, "That is the thing you and we have been dealing in for many years."

Then it is said that this is not a mark for which under the Act of Parliament the applicants are entitled to have the protection of the law. In my opinion the contention is not capable of any serious argument. I do not fail to notice what Mr. *Ingle Joyce* has said to me—that I am dealing with a public officer, an officer who has public interests to regard, and who tries to have the rule on which he acts defined with strictness and with propriety; and the more so because, as I gather from Mr. *Ingle Joyce* (not that it is in evidence, nor should I require it to be in evidence) that Chambers of Commerce and other people have made some objection, I know not what, to the registration of fancy names of this kind, perhaps on the ground of some possible fraudulent use of them. But no instance has been shewn in which it is possible that in this case anybody could be deceived, or in which there could be any confusion or any misleading, for the applicants' goods have been perfectly well known, at least in commerce, as "*Electric*" velveteens; as well-known in fact as the "*Eureka*" shirt.

I think that the Applicants have made out their title to registration upon the very words of the Act of Parliament, and by virtue of the Act of Parliament, for without it they could not have had their fancy name registered at all. This application, therefore, must be granted.

But when I come to deal with the costs, I feel the weight of what Mr. *Ingle Joyce* has said. The Comptroller is a public officer who desires the sanction of the Court, there being a question raised, before he does what the Applicants require him to do. I give the officer the amplest credit for meaning to be impartial and just in all his dealings; but that is no reason why he should lay a fine on an applicant: and if he asks me to order these Applicants to pay his costs, that is, to levy a fine on the Applicants, that I cannot do. On the other hand, I do not think that I have jurisdiction, especially in the teeth of the case which Mr. *Ingle Joyce* cited, *In re Rotherham's Trade-mark* (1) before the Court of Appeal, to order him to pay costs. Even apart from that case, I should have doubted very much whether I had jurisdiction to make this public officer, who comes for the direction of the Court in the discharge of his duty, pay the costs of the persons who seek to compel him to do his duty. However, I can give the officer no costs. Out of the £10,000 which has been mentioned, or from some other source, he will be able to indemnify himself; but whether he will or not is no affair of mine. I cannot permit him under the colour of an order of this Court respecting costs to levy a large fine upon these Applicants who are right in the whole of their contention.

Solicitors: *C. A. Bannister; Solicitor to the Board of Trade.*

(1) 14 Ch. D. 585.

G. I. F. C.

V.-C. B.

1886

July 23, 31; *Aug.* 4.

BUCKMASTER *v.* BUCKMASTER.

[1856 B. 222.]

Married Woman—Infant—Ward of Court—Settlement—Confirmation—Acquiescence—Jurisdiction—Administration Action—Sanction of Court—Practice—Petition—Infants' Settlement Act (18 & 19 *Vict. c.* 43) [*Revised Ed. Statutes, vol. xii., p.* 468].

Where an action is pending for the administration of an estate in which an infant is interested, the Court has, in the event of the marriage of the infant, and either before or after the marriage, inherent jurisdiction, independently of the *Infants' Settlement Act* (18 & 19 Vict. c. 43), to make or sanction a settlement of the infants' property, whether reversionary or in possession.

Under the *Infants' Settlement Act* (18 & 19 Vict. c. 43), an infant may, with the sanction of the Court, and either before or after marriage, make a binding settlement of his or her property of every description. Where an action is pending it is not necessary for the validity of the settlement that the sanction of the Court should be given on a petition intituled under the Act: it is sufficient if the settlement is executed by the parties and approved by the Judge upon the Chief Clerk's certificate in answer to the usual order for inquiries as to a proper settlement.

A settlement that is voidable as having been executed by an infant married woman, may be confirmed by her acquiescence and conduct when of full age.

Upon the death of her father in 1848 *S.* became entitled under his will to a reversionary interest in his residuary personal estate. In 1856 a suit was instituted for the execution of the trusts of the will. In 1862, *S.*, being then an infant of eighteen and a ward of Court, married without the sanction of the Court or the knowledge of her guardian. By an order made in the suit upon motion, an inquiry was directed whether there had been a valid marriage, and if so, what *S.'s* fortune was, and what would be a proper settlement of it. The Chief Clerk having made his certificate, a settlement was executed in 1863 by *S.* and her husband of *S.'s* reversionary interest upon herself for life, with remainder to the children of the marriage, the settlement being signed by the Chief Clerk as having been approved by the Judge. There were four children of the marriage. In 1882 a decree was made by the Probate and Divorce Division for dissolution of the marriage on *S.'s* petition. In 1886 the tenant for life of the fund, which was in Court, died; whereupon *S.* presented a petition in the suit asking for payment out of the fund to her on the ground that the settlement was not binding on her, she having been at the time of its execution an infant and a married woman, and the settlement not having been sanctioned by the Court in manner required by the *Infants' Settlement Act* (18 & 19 Vict. c. 43):—

Held, that the settlement was valid either under the inherent jurisdiction

of the Court over the property of its wards, or under the *Infants' Settlement Act*: also, that even if invalid in its inception, it had been adopted confirmed, and acquiesced in by *S.* by various acts done by her during her coverture and after its termination.

PETITION.

William Buckmaster, by his will, dated in 1838, bequeathed his residuary personal estate to trustees, upon trust for investment and to pay the income thereof to his wife *Sarah Buckmaster* for life, with trusts in remainder for the benefit of his children as tenants in common; and he appointed his said wife guardian of his children during their minorities.

The testator died in 1848, leaving surviving him his wife, *Sarah Buckmaster*, and several children, including a daughter, *Louisa Christian Buckmaster*.

In 1856 the above suit was instituted for the execution of the trusts of the will, and *Louisa Christian Buckmaster* was made a ward of Court.

On the 28th of April, 1862, *Louisa Christian Buckmaster*, being then an infant of eighteen years of age, married *Charles Seaton* without the sanction of the Court or the knowledge of her mother and guardian.

By an order made by Vice-Chancellor *Wood* on the 15th of May, 1862, upon motion in the suit, it was ordered that inquiry should be made whether there had been a valid marriage between Mr. and Mrs. *Seaton*, and if so, what Mrs. *Seaton's* fortune was, and what would be a proper settlement of it.

By his certificate, dated the 27th of June, 1863, the Chief Clerk certified that the marriage was a valid one, and that Mrs. *Seaton's* fortune consisted of an undivided eleventh share, in reversion expectant on the death of *Sarah Buckmaster*, of the testator's residuary personal estate, and that the settlement next hereinafter stated was a proper settlement to be made of such fortune.

By an indenture of settlement made on the 9th of July, 1863, between Mr. *Seaton* of the first part, Mrs. *Seaton*, "an infant of the age of nineteen years or thereabouts," of the second part, and the trustees of the third part, Mrs. *Seaton's* reversionary interest under her father's will was assigned by her and her

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husband to the trustees upon trust for investment, and for payment of the income to Mrs. *Seaton* for her life for her separate use, with remainder for such of the children of the marriage as Mr. and Mrs. *Seaton* jointly or as the survivor should appoint; and, in default of appointment, for the children of the marriage equally at twenty-one or marriage, with ultimate trusts for the benefit of Mrs. *Seaton*. The settlement contained a power of appointing new trustees with Mrs. *Seaton's* consent in writing. The settlement was signed by the Chief Clerk as having been approved of by Vice-Chancellor *Wood*, and was executed by both husband and wife.

There were issue of the marriage four children, all of whom were at present infants.

Under an order made in the suit on the 19th of July, 1873, upon the petition of various parties interested in the testator's estate, including Mr. and Mrs. *Seaton*, and with the consent of *Sarah Buckmaster*, the tenant for life, being a petition for distribution of part of the testator's estate, which was standing in Court to the credit of the suit, a sum of £5405 Consols was transferred to the trustees of Mr. and Mrs. *Seaton's* settlement as part of Mrs. *Seaton's* share thereby settled.

By an indenture, dated the 3rd of April, 1875, and indorsed on the settlement, after reciting the order for transfer of the £5405 Consols, new trustees of the settlement were appointed with the consent of Mrs. *Seaton*, she being a party to and executing the appointment.

On the 3rd of December, 1877, the Probate, Divorce, and Admiralty Division, at the instance of Mrs. *Seaton*, decreed a judicial separation between her and her husband on the ground of the latter's cruelty, and ordered Mrs. *Seaton* to pay to her husband £100 per annum, but with liberty for her to apply to discharge or vary that order.

On the 27th of April, 1882, upon Mrs. *Seaton's* petition, a decree *nisi* was made for the dissolution of her marriage on the ground of her husband's adultery and cruelty, which decree was made absolute on the 14th of November, 1882.

On the 1st of May, 1883, an order was made by the Probate, Divorce, and Admiralty Division varying the settlement by ex-

tinguishing all the powers and interest of Mr. *Seaton* therein as if he were already dead; and also discharging the order for payment to him of £100 per annum, it appearing that Mr. *Seaton* had sufficient independent means. This order was made upon a petition by Mrs. *Seaton*, which set out the settlement in full, and also upon a report by the Registrar of the Probate, Divorce, and Admiralty Division, to whom the petition had been referred, and before whom Mrs. *Seaton* had appeared by counsel.

Sarah Buckmaster, the tenant for life, died on the 19th of February, 1886.

On the 17th of April, 1886, an order was made in the suit, declaring that, according to the construction of the testator's will, his residuary estate was divisible in tenths, and directing one tenth of the fund in Court representing such estate to be carried over to the credit of Mrs. *Seaton's* share "alleged to be settled" by the settlement of 1863, and thereupon one tenth —amounting to about £20,000—of the fund in Court was carried over accordingly. Mrs. *Seaton* then presented this petition, asking that the share so carried over might be transferred to her, or, in the alternative, that the income thereof might be paid to her until further order.

The petition alleged that, inasmuch as at the time of the execution of the settlement of 1863, the Petitioner was an infant and a married woman, the settlement was not binding upon her. On the third day of the hearing of the petition the Petitioner's counsel asked leave to use an affidavit just filed by the Petitioner, stating in effect that until she consulted her solicitors shortly before the presentation of the petition she was not aware of her real position under the settlement, or of her actual rights in the property purported to be settled, but the Vice-Chancellor refused to allow the affidavit to be read.

Fischer, Q.C., and *B. B. Rogers*, for the Petitioner:—

First, the Court had no jurisdiction to settle this lady's property except in accordance with the *Infants' Settlement Act* (18 & 19 Vict. c. 43); that is to say, on petition and by an order made upon it: *Peareth* v. *Marriott* (1); *In re Yates* (2); *Seton* on

(1) W. N. 1866, p. 48. (2) 7 W. R. 711.

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Decrees (1). Here there was neither a petition nor an order. The Act does not apply to a settlement made after marriage.

Secondly, there was no acknowledgment of the settlement by the lady under *Malins' Act* (20 & 21 Vict. c. 57). The *Infants' Settlement Act*, in removing the disability of infancy, places an infant married woman in the same position as an adult, but not in any better position; and as an adult married woman cannot dispose of her reversionary interests without acknowledgment under *Malins' Act*, it follows that neither can an infant married woman do so. They referred to *Field* v. *Moore* (2) and *Codrington* v. *Codrington* (3).

Marten, Q.C., and *T. L. Wilkinson*, for the Respondents, Mrs. *Seaton's* four children:—

First, we say the settlement was binding under the *Infants' Settlement Act*. Sect. 3 of the Act does not say that the sanction of the Court to a settlement by an infant "must be" given on petition, but only "may be." The form of order given in *Seton* on Decrees (4) shews that an order may be made in a suit as well as on a petition. In *Peareth* v. *Marriott* (5) the point was not discussed: Vice-Chancellor *Wood* only said he thought it would be better to present a petition. Again, in *In re Yates* (6) there was no discussion. The section is intended to provide for the case of there being no suit. Here the lady was a ward of Court, and the Court had complete control over her property. The Act includes a post-nuptial settlement: *Powell* v. *Oakley* (7), *In re Sampson and Wall* (8). Acknowledgment by the infant married woman is unnecessary, for the words of the Act are comprehensive enough to include every description of property, sect. 1 expressly mentioning property "in reversion." *Malins' Act* has nothing to do with the case, the reversionary interest having arisen under an instrument made before the Act.

Secondly, even if the settlement is not binding on Mrs. *Seaton* under the *Infants' Settlement Act*, she has since confirmed it by

(1) 4th Ed. p. 756.
(2) 7 D. M. & G. 691.
(3) Law Rep. 7 H. L. 854.
(4) 4th Ed. p. 763.
(5) W. N. 1866, p. 48.
(6) 7 W. R. 711.
(7) 34 Beav. 575.
(8) 25 Ch. D. 482.

conduct, she never having questioned the validity of the settlement until now, and having been party to various dealings with the trust funds, expressly on the footing of the settlement being valid: *Davies* v. *Davies* (1); *White* v. *Cox* (2); *Milner* v. *Harewood* (3); *Ashton* v. *M'Dougall* (4). In particular, after the decree *nisi*, when she became a single woman, she presented a petition in the Probate, Divorce, and Admiralty Division to have the settlement varied, on the assumption that the settlement was binding. The order made by that Division was under the jurisdiction given by sect. 5 of 22 & 23 Vict. c. 61, a jurisdiction exercisable primarily for the benefit of children: *Corrance* v. *Corrance* (5).

Fischer, in reply:—

The only jurisdiction the Court has to settle the property of an infant is derived under the *Infants' Settlement Act*. Before that Act the Court had no such jurisdiction: *Simpson* on Infants (6); *Field* v. *Moore* (7); *Codrington* v. *Codrington* (8). Here the Court did not purport to exercise the jurisdiction given by that Act, nor did it make any order according to the usual practice: *Seton* on Decrees (9). As to the alleged confirmation, Mrs. *Seaton* did not know what her rights were until shortly before she presented this petition: "acquiescence imports full knowledge;" per Lord Justice *Turner* in *Life Association of Scotland* v. *Siddal* (10). *Milner* v. *Harewood* (11) and *Ashton* v. *M'Dougall* (12) were cases of election: in the latter case, it was when the lady became discovert that she acted on the settlement: so in *Davies* v. *Davies* (13) and *White* v. *Cox*. In *Rawlins* v. *Birkett* (14), two years' inaction after the husband's death was not held to be a confirmation. At all events there has been no confirmation beyond the £5405 consols.

(1) Law Rep. 9 Eq. 468, 471.
(2) 2 Ch. D. 387.
(3) 18 Ves. 259, 277.
(4) 5 Beav. 56, 65.
(5) Law Rep. 1 P. & D. 495.
(6) Page 310.
(7) 7 D. M. & G. 691.
(8) Law Rep. 7 H. L. 854.
(9) 4th Ed. p. 763, Form 16.
(10) 3 D. F. & J. 58, 74.
(11) 18 Ves. 259.
(12) 5 Beav. 56.
(13) Law Rep. 9 Eq. 468.
(14) 25 L. J. (Ch.) 837.

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Millar, Q.C., and *Brabant*, for the Respondent, the surviving trustee of the settlement.

BACON, V.C.:—

Two points have to be considered in this case: the first is as to the validity of the settlement *per se*. Now, consider what the settlement was, and under what circumstances it was executed, for executed it was. The Court of Chancery from all time has exercised, partly through legislation and partly out of necessity, a kind of paternal jurisdiction over infants who are parties to suits before it, and also over infants who are not parties to any suit but are interested in the administration of property.

Now in this case a testator dies in 1848, leaving a widow and several children. By his will he gives his residuary personal estate to trustees for the benefit of his children, but subject to the life interest of his widow. A Chancery suit is instituted for the administration of his estate, and the Court has thus full possession and control over that estate. That estate is in a sense entrusted to the Court to protect all existing interests and to provide for all future interests, and to see that justice is done in the administration of it. The Court finds that amongst the persons interested are a number of children. The paternal jurisdiction of the Court is at once aroused and put into active exercise in favour of those children. Then one of them, an infant daughter, contracts a marriage without the consent of the Court and without the knowledge of her guardian. What is the consequence of that marriage? By the marital right of the husband he became entitled to all that which the wife before possessed. I am not forgetting that, as regards the property of the wife, which was reversionary, this right was not available until that reversionary interest was reduced into possession; but he had the right to reduce it into possession whenever he could. If the tenant for life had died the next day, his wife's share would have become unquestionably his, subject, of course, to any settlement which the Court might make.

That was the right of the husband. But the Court, having the right to protect the infant, stretches out its arm and seizes the

husband by the collar, and says, "You shall make a settlement; you shall not take this young lady's property, she is my ward and I will protect her." That is the law. Accordingly, the husband, whether he chose to do so or not, or whether he was afraid of going to jail if he refused to be a party to the settlement, surrenders his marital right so that it may be settled for the benefit of this ward of Court.

I am told that this is not a settlement by the infant. I say it is the Court's settlement. The Court makes the settlement and makes the husband settle. In my opinion this settlement is as valid as if it had been made under any ordinary circumstances. But if there were any doubt about it the *Infants' Settlement Act* of 1855 puts it beyond the possibility of doubt. If I were to adopt *ex cathedrâ* the sentence which has been quoted to me from *Simpson* on Infants, I might begin to feel some doubt upon the point, but I decline to adopt that as the law. A text-writer may give his summary of what appears to him to be the law, but it does not follow that the Court is to adopt it.

Now what does the Act of Parliament say? It commences with this recital: "Whereas great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property." Then, to remedy that, the Act says in the 1st section, "From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement." Can anybody after that venture or hope to argue successfully that there is not complete jurisdiction in the Court of Chancery, whether before or after marriage, to sanction every settlement made by an infant? The jurisdiction is clear and indisputable from the authorities. In the case which was referred to by Mr. *Fischer*, of *Field* v. *Moore* (1), the settlement was held not to be binding, the wife not having duly acknowledged it under the *Fines and Recoveries Act*, and having done nothing and said nothing in confirmation of it up to the day of her death. That case has no application whatever to the case now before us. I should be

(1) 7 D. M. & G. 691.

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very sorry to hold out any encouragement to the doctrine that has been contended for, namely, that this is an invalid settlement because it was not made in pursuance of an order made on petition. It was made under an order in a cause in which the Court had jurisdiction, and every necessary formality was complied with.

Upon the first question, then, I entertain no doubt, as I have said more than once; and it is important that there should not be any doubt thrown upon the validity of the various settlements made by infants not differing from this in substance and effect in any way, because, if I were to do so I should open the door to a flood of actions or proceedings of this sort on the part of ladies who have come to very mature ages, whose views may have become so changed as to be very different from those which they had when the marriage was celebrated, and who might come in flocks and say: "Upset these settlements; let us destroy all this nonsense: we have discovered that the Act of Parliament has sanctioned no such orders as were made."

In my opinion the settlement in question is a perfectly valid and good settlement, and it must be taken to be so in law; and I must add that if there were any doubt about it in law, the confirmation of it by this lady has been clear, distinct, and unequivocal. In saying that I do not forget that Mr. *Fischer* this morning proceeded to read to me an affidavit by the lady, only just filed, in which she says that she did not know her rights. After the detailed proceedings in the Probate Court and elsewhere I cannot hear her say that. I said, and I say again, it is an idle affidavit. If, while a trial is proceeding, one of the parties interested gets up and says for the first time, "I did not know about this," can the Court listen to him or her? As I told Mr. *Fischer*, when he proposed to read it, I cannot listen to the affidavit. How can I tell whether the facts she wishes to tell the Court are correct or not? I have no means of investigating them. But I have the means of knowing that she did come to the Court and anticipate the settlement by obtaining the transfer to the trustees of £5405 Consols, under an order made on a petition in which she said, "Let me have that sum put into my settlement." It is said the lady was a married woman at the time. What has that to do

with it? She could have appeared on the petition by her next friend, and she could have made any objection she liked, but she made no objection. She knew the fund was settled; she was desirous that the £5405 Consols should be dealt with in a particular way, as mentioned in the order; she grounded her application upon the very settlement which she had executed, and she confirmed the settlement and acquiesced in it in every way to the fullest possible extent. In one of the cases cited Lord Justice *Turner* says "acquiescence means knowledge." I say that knowledge here is abundant. The lady says: "This is my settlement; I want the £5405 to be carried to the trusts of it." A more direct and plain act by which a settlement could be confirmed I cannot conceive; and certainly it cannot be cut down by the lady saying this morning in her affidavit she did not know her rights. This is too frivolous and does not deserve so much attention as has been bestowed upon it. The proceedings under which the transfer out of Court was made are clear and precise, and they all went upon the footing of the actual existence and unquestionable validity of the settlement which had been executed. As to the practice in the Probate Court, I am not so conversant with it, but the general view I take of it is this, that the Probate Court has a jurisdiction over the subject-matter contained in a settlement, which jurisdiction it will exercise mainly for the benefit of the children. If it is for the benefit of the children that the settlement should be altered in any way, the Court will consider the matter and modify the settlement as it did here. Upon making the decree for judicial separation, the Court decided that the income that should be settled upon the husband should be £100 a year for his life; but it appearing subsequently, for reasons which were stated on a subsequent application presented to the Probate Court, that the husband did not want the £100 a year, and that the wife did, the Court took away from him all the powers given him by the settlement, and also the £100 a year which it had directed the wife to pay. So that by dint of the settlement the wife got discharged from the first decree of the Court; that is to say, when it appeared that it was for her benefit that she should have that sum of money, she applied to the Court and asked the Court under that very settle-

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ment to give her what she considered she was entitled to. She has, in fact, had the benefit of the settlement at every turn.

There is no authority that a settlement executed with the sanction of the Court, and by the Court compelling the husband to execute it, is not a perfectly valid settlement, although the lady may be an infant at the time. The Court has to discharge that paternal duty which is vested in it. Under settlements of this kind the Court grants money to infants for the purpose of their education; and in the exercise of the unlimited power it possesses, it often gives a son money to enable him to enter the army or to advance him in business; it also advances money to enable the children to have the benefit of a more extensive education in *Germany*, *Italy*, or elsewhere. That I have to do frequently in Chambers.

The authorities satisfy me that this settlement is perfectly valid, and if I had any doubt about that, then I say that the Act of Parliament covers the case; in addition to which there has been confirmation and acquiescence on the part of the lady, with full knowledge of the facts, so that she comes precisely within that very careful definition of acquiescence given by Lord Justice *Turner* to which I have already referred. Notwithstanding all this, having acted constantly on the footing of the settlement being a binding settlement, she comes twenty-three years afterwards and says: "I did not know what my rights were." I have bestowed the greatest attention to the argument which has been addressed to me, because it is a novel one. In my opinion it is unsound in every respect, and without any foundation whatever to support it.

The only order I can therefore make on this petition is for payment of the income of the fund in Court to the Petitioner until further order: the costs of all parties to come out of the capital of the fund.

Solicitors: *Purkis & Co.; Hadden-Woodward & Co.; Capron, Daltons, Hitchins & Co.*

G. I. F. C.

In re HOBSON.

V.-C. B.
1886
Aug. 3, 5.

Judgment Creditor—Elegit—Lands—"Delivery in Execution"—"Seizure"—Bankruptcy of Debtor—Receiving Order—Return of Writ—Sheriff—Priority—Bankruptcy Act, 1883, *s.* 45, *sub-s.* 2.

The delivery of land of a judgment debtor in execution by the sheriff under a writ of *elegit* is a "seizure" of the land so as to make the execution of the judgment creditor "complete" within sect. 45, sub-s. 2, of the *Bankruptcy Act*, 1883; and a receiving order in bankruptcy made against the debtor after the delivery in execution, but before the return of the writ, does not oust the right of the judgment creditor.

PETITION.

On the 4th of March, 1886, the *Union Bank of Manchester* recovered judgment against *Thomas Hobson* for £14,454 16*s.* 8*d.*, interest and costs. On the following day, the 5th of March, the bank sued out a writ of *elegit* against the lands of the debtor. On the 9th of March the judgment was registered pursuant to sect. 19 of the *Judgment Act*, 1 & 2 Vict. c. 110. The writ of *elegit* was duly delivered to the sheriff of *Cheshire*, who thereupon held an inquisition at *Chester* on the 10th of March, when a jury found that *Hobson* was possessed of certain leasehold cottages and lands at *Wilmslow, Cheshire*, held for a term of 999 years, and at half-past 12 o'clock on the same day, the sheriff delivered possession to the bank. At 4 o'clock on the same day *Hobson* filed a petition in bankruptcy in the County Court at *Manchester*, and a receiving order was at once made upon that petition. At the time of the delivery in execution by the sheriff the bank had no notice of any proceedings in relation to the bankruptcy petition or of the committal of an act of bankruptcy by *Hobson*. On the 11th of March the sheriff returned the writ, which, with the return, was duly filed. On the same day the bank served notices of the inquisition on the tenants of the property, directing them to pay their rents to the bank. On the 25th of March a trustee in the bankruptcy was appointed by the creditors, and the appointment was subsequently certified by the Board of Trade. *Hobson* died on the 12th of April.

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The judgment debt being still due, the bank presented this petition under the *Judgment Act*, 1864, 27 & 28 Vict. c. 112, asking that the interest of the debtor in the property which had been delivered in execution might be sold and the proceeds applied in payment of the judgment debt, or that, if there were any other charges on the property, the proceeds might be applied in payment of what was due to the parties entitled thereto according to their respective priorities, and for necessary accounts and inquiries.

The question was whether the delivery in execution by the sheriff was a "seizure" within sect. 45, sub-sect. 2, of the *Bankruptcy Act*, 1883.

Millar, Q.C., and *Hornell*, for the Bank:—

Sect. 4 of the *Judgment Act*, 1864, 27 & 28 Vict. c. 112, enacts that "every creditor to whom any land of his debtor shall have been actually delivered in execution" shall be entitled, on petition, to an order for sale. But a difficulty arises in consequence of sect. 45, sub-sect. 2, of the *Bankruptcy Act*, 1883, which says that, for the purposes of that Act, "an execution against land is completed by seizure:" and it is, therefore, said that we are to be deprived of the fruits of our judgment and the subsequent delivery in execution because there has been no actual "seizure" within the meaning of that section. The simple question then is, What is the meaning of "seizure"? We submit that it means nothing more than, and is in fact identical with, "delivery in execution," and that it does not and cannot signify actual manual seizure. "Execution" would have been "seizure" under the old bankruptcy law: *Bankruptcy Act*, 1869, s. 95; and the Act of 1883 introduces no new law. That delivery in execution is equivalent to seizure is also clear from sect. 11 of the *Judgment Act*, 1838, 1 & 2 Vict. c. 110, which says that the lands taken in execution by the sheriff shall "by force and virtue of such execution . . . be held and enjoyed" by the party to whom execution is delivered; and this section is not altered by the subsequent *Judgment Act* of 1864. "Actually delivered in execution" in the section of the latter Act under which we are now proceeding means the same thing as "delivered in execution:" *Anglo-Italian*

Bank v. *Davies* (1). Even the appointment of a receiver operates as a delivery in execution: *Ex parte Evans* (2); and is thus a "seizure."

Marten, Q.C., and *Yate Lee*, for the trustee in bankruptcy:—

We submit that "seizure" in sect. 45, sub-sect. 2, of the *Bankruptcy Act*, 1883, means, not perhaps a physical seizure, but some definite taking possession of the land. The section means that the judgment creditor must do all he can or he cannot get execution. To enforce the judgment three steps are necessary: (1) Issue of the writ of *elegit;* (2) Symbolical delivery of possession by the sheriff; and (3) The return of the writ. "The writ of *elegit* must, in all cases, be returned, if the sheriff has done anything under it, and it is essential that the *elegit* and the inquisition taken by the sheriff should be returned and filed, when land is extended by the writ, otherwise the tenant by *elegit* would have no title": *Churchill's* Law of the Sheriff (3). As Lord *Coke* says in *Hoe's Case* (4) the writ, until it is returned, "is nought worth." Thus an inquisition has no effect without the return, and until the return the title of the judgment creditor is only inchoate. He has no right in the shape of a lien on the land until he has got the return: *Guest* v. *Cowbridge Railway Company* (5). That there is no "delivery in execution" until the sheriff's return is expressly recognised by Lord Justice *James* in *Ex parte Evans* (6). In the present case, therefore, the receiving order having been made before the return, the trustee in bankruptcy has a prior title to the judgment creditor.

BACON, V.C.:—

The point of law which has been raised has been fixed and settled for centuries, as far back as the time of Lord *Coke*. The Petitioners, the bank, are judgment creditors of this man who became bankrupt. They issued execution under their judgment and did all in their power to enforce it, but by accident the return of the writ was not made until after the receiving order in the

(1) 9 Ch. D. 275, 283.
(2) 13 Ch. D. 252, 257.
(3) 2nd Ed. p. 365.
(4) 5 Rep. 89 b, 90 a.
(5) Law Rep. 6 Eq. 619, 623.
(6) 13 Ch. D. 258.

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bankruptcy. Can such a circumstance as that deprive a man of his lawful right to payment of the debt due to him? Here the creditors did obtain judgment, they did get execution, they did get a return of the writ, they were, by notice to the tenants, in actual possession, and their writ of *elegit* was complete within the meaning of the present *Bankruptcy Act*. In my opinion their right is beyond doubt. When it is said that it is necessary to get the sheriff's return, that is true as regards procedure but not in substance. The return merely shews that the sheriff has acquitted himself of his duty, and in that respect it is necessary that he should make a return. Is it to be said that, because the formal return was not made until after the receiving order, the bank is to lose its priority? Supposing the sheriff has been prevented by a fit of apoplexy from making his return, is the judgment creditor to suffer for that? The bankers have done everything in their power, and is it to be said that they are to be choused of their remedy? Their title was complete before the bankruptcy existed, and therefore their right now is the same as if the bankruptcy did not exist at all. In my opinion the Petitioners are entitled to an inquiry as to the lands extended under the *elegit*, and to an order for sale and for the application of the proceeds in payment of their debt.

Solicitors: *Merriman, Pike, & Merriman*, for *Partington & Allen, Manchester; Bolton, Robbins, Busk & Co.*, for *Weston, Grover, & Lees, Manchester.*

G. I. F. C.

EDISON AND SWAN UNITED ELECTRIC LIGHT COMPANY *v.* HOLLAND.

V.-C. B.
1886
Aug. 6.

[1886 E. 823.]

Practice—Third-party Procedure—Claim of Indemnity—Indemnity after Service of Writ—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48.

Leave may be given to a defendant to serve notice of claim for indemnity on a third party, under Rules of Supreme Court, 1883, Order XVI., r. 48, whether the indemnity has been given after or before action brought.

On the application for leave the Court will not go into any question as to the merits of the action or the validity of the claim for indemnity.

THIS was an action for alleged infringement of the Plaintiffs' patents for electric incandescent lamps.

The Defendant *Holland* was the manager of the *Albert Palace, Battersea*, and the Plaintiffs' complaint was that he was there using electric lamps similar to the Plaintiffs', the lamps having been supplied to him by the Defendants, the *Jablochkoff and General Electricity Company, Limited.* It appeared that the *Jablochkoff Company* had themselves purchased these lamps from the *Anglo-American Brush Electric Light Corporation, Limited*, who were the manufacturers of them.

The writ in the action was issued on the 20th of July, 1886. On the same day, after service of the writ on the Defendants, the *Jablochkoff Company*, an agreement was entered into between the *Jablochkoff Company* and the *Anglo-American Company* whereby the latter company agreed to indemnify the former against all liabilities and costs under the action. The agreement was made in pursuance of an arrangement made between the two companies, through their solicitors, upon the *Jablochkoff Company* receiving an intimation from the Plaintiffs that proceedings were about to be taken for infringement. Under these circumstances the *Jablochkoff Company*, being desirous of bringing the *Anglo-American Company* into the action as third parties, now applied by summons for leave to issue a notice in the action, under Rules of the Supreme Court, 1883, Order XVI., r. 48, claiming an indemnity

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against the *Anglo-American Company*, and to serve the same together with a copy of the writ of summons, on that company.

Sir *Horace Davey*, Q.C., *Marten*, Q.C., and *Renshaw*, for the Defendants, the *Jablochkoff Company*:—

The application is clearly within Order XVI., r. 48, which says that, "where a Defendant claims to be entitled to contribution, or an indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third-party notice) to that effect." On an application of this kind the Court will not decide as to the Defendants' right to the indemnity, the only question being whether they claim indemnity within the meaning of the rule: *Carshore* v. *North Eastern Railway Company* (1).

The Attorney-General (Sir *R. Webster*, Q.C.), *Aston*, Q.C., *Moulton*, Q.C., and *Bremner*, for the Plaintiffs:—

The third-party rule does not apply to a case like this, where an indemnity is given to the Defendants after action brought. It would introduce an entirely new practice, there being no contract between the Defendants and the third party at the time of action brought, to allow the Defendants to bring in the third party under a subsequent contract. The only case in which the rule can be used is where there is a question to be tried which will affect the liability of a third party under an already existing contract establishing a privity between the Defendants and that third party. Here the question lies solely between ourselves and the Defendants: nothing has to be tried between us and the *Anglo-American Company*, and their presence is therefore unnecessary. In *Carshore* v. *North Eastern Railway Company* the question was one of title to shares under an alleged contract with the third party prior to the action, the question being not only as between the Plaintiff and the Defendants, but also as between the Defendants and the third party.

BACON, V.C.:—

It is said there is no precedent for such an application as this; but there is a rule of Court equivalent to an Act of Parliament—

(1) 29 Ch. D. 344.

a rule so plain that nothing can surprise me more than to hear that the application is opposed.

The policy of the law expressed in the rule is plain. If *A.* is suing *B.*, and *B.* denies his right to sue, but says, "even if he is entitled to sue, *C.* has indemnified me; let him come here and fight his own battle, or help me to fight mine," the object of the rule of procedure is that there should be a discussion and a decision, once for all, of the real substance of the dispute.

There is no doubt that the Defendants were clearly right in taking out this summons; and to go into the nature of the indemnity would be a most idle and absurd thing for me to do. The rule is sufficient; the rule is plain; it is a case where an indemnity has been given. To say that the rule cannot be resorted to because the indemnity was subsequent to the service of the writ is a mistake. Whatever change takes place in the rights of the original parties to an action may be set right either by amendment or by adding parties; and that is the constant practice of the Court. The learned counsel for the Plaintiffs endeavoured to tempt me into some discussion upon the merits; but I simply refused to have anything whatever to say to them, or to attend to the argument in that respect.

I think the order must be made.

Solicitors: *Ashurst, Morris, Crisp & Co.; Mills, Dowson & Co.*

G. I. F. C.

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May 31;
June 1, 2, 7, 8, 26.

LUDDY'S TRUSTEE *v.* PEARD.

[1884 L. 1718.]

Solicitor and Client—Bankruptcy of Client—Purchase by Solicitor from Trustee in Bankruptcy—Setting aside Purchase—Concealment of Facts—Obligation to make complete Disclosure to Trustee.

The obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client.

C. B. L. was, under the will of his mother, entitled to an interest in real estate, but whether for life or absolute was doubtful. He became bankrupt, and a trustee in bankruptcy was appointed. *J. D. P.*, the solicitor of the bankrupt, had as solicitor, and having acted for some years as receiver, acquired an intimate knowledge of the nature and value of the estate. He had in negotiating mortgages for *C. B. L.* to consider the extent of his interest under the will; had obtained the opinion of counsel that it was for life only; but had himself formed an opinion that it was, probably, absolute, and not as he had described in his correspondence with the parties concerned merely for life; and he also formed an opinion that the estate was more valuable than the rental shewed. He did not disclose his opinion to *C. B. L.*, or to the trustee in bankruptcy, or to his solicitor. He was employed by the bankrupt to negotiate with the trustee for the purchase of his interest for the benefit of his wife and children. In the negotiation, as solicitor and agent for the bankrupt, he found that the trustee could be induced to sell the interest for a very small sum (£77), and he availed himself of his knowledge, and contracted to purchase, secretly, for himself, but in the name of his brother, an interest which, as the Court afterwards, in an action for administration, held, was absolute, and was worth some thousands of pounds. He never suggested to the trustee that he intended to purchase for himself, but gave him and his solicitor to believe that the purchase was on behalf of the bankrupt's family. In an action by a subsequent trustee in bankruptcy to set aside the sale:—

Held, that the trustee in bankruptcy stood in the place of the bankrupt for the purpose, that the solicitor for the bankrupt could not be allowed to hold as against the trustee an advantage obtained by him in the purchase from him by means of the knowledge which he had gained whilst acting as solicitor for the bankrupt, and that *J. D. P.* and his brother were trustees for the trustee in bankruptcy and must give up to him every advantage of the purchase.

THIS was an action by the trustee in bankruptcy of *C. B. Luddy* against *John Davis Peard* and *William Peard* to set aside a sale made by a former trustee in the bankruptcy of the bank-

rupt's interest under a will. The Defendants were the solicitor of the bankrupt and his brother, and the sale was made to the former in the name of the latter. The Defendant *J. D. Peard* acted as solicitor of *C. B. Luddy* in the lifetime of his mother *Eliza Ann Luddy*, and after her death he continued to act as such solicitor for a time, the length of which was disputed.

From *E. A. Luddy's* death until a short time before the commencement of the action, *J. D. Peard* also acted as solicitor for *C. B. Luddy* and his aunt, *Mary Morton*, as the executors and trustees of the will of *Eliza Ann Luddy*. Under the will the residue was left upon trust for the benefit of *C. B. Luddy* or his children in terms which occasioned a question of some difficulty as to what interest *C. B. Luddy* actually took. Mrs. *Luddy*, by her will, made in 1872, left all her real and personal estate to her trustees, directing them to pay to her sister, *Mary Morton*, an annuity of £65, and to her daughter, *Eliza Luddy*, spinster, an annuity of £25, and as to all the residue of her real and personal estate she directed her trustees to convey, assign, or otherwise assure the same to her son, *C. B. Luddy*, his heirs, executors, administrators, and assigns absolutely: and if he should marry and die leaving children who should attain twenty-one, then she directed her trustees to convey and assign the residue to such children, but if her son should die in her lifetime without leaving children, then they were to convey to his widow, and to *Mary Morton* and to *Eliza Luddy* as tenants in common. The testatrix died in October, 1876. *C. B. Luddy* was at that time in business in partnership with Mr. *Blewitt*, and was desirous of raising money for the purposes of the business upon the property to which he was entitled under the will. He consulted *J. D. Peard* as to that, and he obtained for him an opinion of counsel on the 7th of December, 1876.

C. B. Luddy had at that time two children, both infants. The opinion was that he had an absolute equitable interest defeasible by an executory gift in favour of such of his children as should attain twenty-one, and that that was no better than a life estate for the purpose of borrowing money. On the 11th of December, 1876, *J. D. Peard* wrote to *C. B. Luddy* thus:—"I have taken counsel's opinion as to your interest under the will. He is clearly

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of opinion that you only get a life interest, and after your death the property goes to your children, but if your children should die in your lifetime under twenty-one the property would belong to you absolutely. P.S. This prevents the raising of money upon the property—it is an unfortunate will in one or two respects."

The testatrix had little or no personal estate, but she had a one-third share of a freehold public-house, *The Horns*, at *Shoreditch*, and a third of two other houses and of a carriage factory in the same neighbourhood; and the entirety of No. 5, *Hackney Road, Shoreditch*, and of No. 114, *Whitecross Street*. All that property except No. 114 was subject to a mortgage for £1400 made by the testatrix, and was of course subject to the annuities under the will.

On the 15th of March, 1877, *J. D. Peard* advanced to *C. B. Luddy* £111, taking from him a memorandum of charge expressed to be upon all his estate and interest in the freehold property under his mother's will, and all other his interest under the said will. *J. D. Peard* was at that time negotiating for a mortgage on behalf of *C. B. Luddy* for a sum of £500, and it was subsequently lent by a mortgagee, Mr. *White*. To a requisition made on the first attempt, the answer in the handwriting of *J. D. Peard* was that the leases were of considerable value to the tenants who had spent money on the property, the rentals being nothing like the full value; that he agreed it was difficult to say what the estate was, but that he had taken counsel's opinion on the will, who agreed that for all practical purposes *C. B. Luddy's* title was no better than a life estate, and he sent a copy of the opinion. In answer to further requisitions *J. D. Peard* stated that the basis of the proposal was that the security was only that of a life estate, but the mortgagor being entitled in fee subject to the executory devise over his interest in fact was rather better than a life estate, and in answer to another requisition he stated that the present leases of the property were granted, the tenants laying out considerable sums. The last answers were dated the 17th of March, 1877. The mortgage was carried out by a deed dated the 26th of March, 1877, and in it *Mary Morton* joined to postpone her annuity of £65, and a policy of assurance upon the life of *C. B. Luddy* for £525 was assigned by way of further security.

In April, 1878, *C. B. Luddy* dissolved the partnership with *Blewitt.*

On the 28th of June, 1878, the trustees sold No. 5 *Hackney Road* for £2200, out of which they paid £1438 in discharge of the mortgage made by the testatrix, and £547 16*s.* in discharge of the mortgage to Mr. *White,* who thereupon conveyed the property to the trustees; sums of £32 and £14 4*s.* were retained by *J. D. Peard* for costs, and the balance of £168 was handed to *C. B. Luddy,* who thereby became indebted to the trust estate to the amount of £730.

On the 6th of July, 1878, *C. B. Luddy* under the advice of *J. D. Peard,* his solicitor, again mortgaged all his interest in the property to *Sarah Freeman* for £500; *Mary Morton* again postponed her annuity, and the former policy for £525, and a new policy for £650 were assigned as further security.

By a deed dated the 8th of July, 1878, after reciting that *C. B. Luddy* was at least entitled during his life to the income of the residue subject to the annuities, he assigned such interest as he had and also the two policies to *Mary Morton,* subject to the mortgage to *Sarah Freeman* to secure the £730 due from him to the trust estate. It was alleged that the £500 raised by the mortgage to *Sarah Freeman* was received by *J. D. Peard* on behalf of *C. B. Luddy.*

On the 8th of July, 1878, *C. B. Luddy* and the mortgagees appointed *J. D. Peard* receiver, and he acted as such for a considerable time afterwards.

J. D. Peard acted as solicitor for *C. B. Luddy* in all those transactions; and on the 11th of April, 1878, he advised him to make a settlement of the whole of the remaining property upon his wife and family to prevent, as he said, any further loss to *C. B. Luddy* in business.

That was afterwards carried out by a deed dated the 3rd of September, 1878, but which, as stated, was not executed till the month of October. It contained a power to *C. B. Luddy* to revoke. On the 8th of November, 1878, *J. D. Peard* obtained from an actuary a valuation of the reversionary interest for life in the sum of £70, whereof £50 might be taken as falling in when a life aged seventy last birthday dropped, and the other £20

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when a life aged fifty-five dropped, the reversioner being forty-two; and the value estimated was £231.

On the 21st of November, 1878, *J. D. Peard* took a charge from *C. B. Luddy* for the costs and expenses due or to become due in respect of or incidental to proceedings about to be taken by him on behalf of *C. B. Luddy* for an arrangement with his creditors, and for the obtaining of a further life policy for £150, and a charge for the first premium on that policy.

On the same day a petition for liquidation was presented. A statement of *C. B. Luddy's* affairs was prepared by *J. D. Peard*, and signed by him, in which he proposed to revoke the settlement. That attempt, however, fell through. *C. B. Luddy's* goods were sold under an execution, and in April, 1879, he left the country and went to *Boulogne*.

On the 19th of March previously Mr. *Sperring* presented a petition in bankruptcy against *C. B. Luddy*, and upon the 9th of May, 1879, he was adjudicated bankrupt, and upon the 6th of June Mr. *Sperring* was appointed the trustee in the bankruptcy.

Mr. *Devonshire* acted as solicitor for Mr. *Sperring* in the bankruptcy.

On the 21st of May, 1879, Mr. *Devonshire* put himself in communication with *J. D. Peard* concerning the bankrupt's estate, and on the 7th of July, 1879, he had an interview with him, at which he requested a statement in writing of the bankrupt's property, and it was afterwards furnished by *J. D. Peard*, who began it by stating that under Mrs. *Luddy's* will *C. B. Luddy* was entitled for life only to the rents and annual income of the property thereinafter mentioned, subject to two annuities; and then followed a statement of the income and the outgoings, which it was said left a deficiency, and the statement closed with a mention of the settlement, a copy of which was supplied; "but judging from the above facts, it cannot be worth anything, and his bankruptcy no doubt rendered the settlement void."

On the 15th of July, 1879, a meeting of the creditors took place, and at it *C. B. Luddy's* affairs were discussed, and a copy of Mrs. *Luddy's* will was produced.

Mr. *Devonshire* reported that *C. B. Luddy* had only a life interest in the property. That was questioned by Mr. *Buckler*, a

creditor and a solicitor, and he, it seemed, suggested that the construction of the will was doubtful. A correspondence took place between Mr. *Devonshire* and Mr. *J. D. Peard* as to the bankrupt's property and the mortgages upon it; and on the 20th of October, 1879, *J. D. Peard* wrote to Mr. *Devonshire* thus:—"I have looked into this matter since you saw me, and cannot find there is any value, having regard to the various incumbrances and claims in the equity and contingency, especially as I do not suppose any further assurance could be effected, and the present policies would not suffice for all that is required even now. If Mr. *Luddy's* discharge were agreed to be granted, I might get a purchaser for £50 if you think proper to entertain it. I may add I have not communicated with Mr. *Luddy*, or been asked to seek his discharge, which will not, I imagine, be of any real value to him; but I think it should be made part of the bargain."

On the 28th of October, 1879, Mr. *Devonshire* answered, requesting further information as to the property, ages of the annuitants, and as to a proposed purchase of part of the property by the Metropolitan Board of Works.

On the 29th of October *J. D. Peard* replied, giving the annuitants' ages; stated that the Board were taking No. 114, *Whitecross Street*, and concluded thus:—"I do not see, having regard to the debts due from the bankrupt, that there is any saleable value whatever in the equity of redemption."

On the 7th of November *J. D. Peard* wrote revoking the offer in his letter of the 20th October "to get a purchaser for £50."

On the 2nd of February, 1880, *C. B. Luddy* wrote to *J. D. Peard*, returning a deed, which was a conveyance of the *Whitecross Street* property by the trustees to the Metropolitan Board of Works, and asking that the money should be applied in paying off the last mortgage of £500. In that letter he urged *J. D. Peard* to do the best he could for him, and inquired if there was any chance of obtaining his discharge?

On the 5th *J. D. Peard* answered, suggesting that Miss *Morton* and *C. B. Luddy* should retire from the trust, and that new trustees should be appointed; stating that he had seen Mr. *Sperring*, and there seemed to be no chance of any dividend; and saying that it would be a good thing if the mortgage were

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paid off; "but as you have only a life interest in the money" there was little chance of the Court so applying it.

On the 10th of February, 1880, *C. B. Luddy* wrote again, regretting that any further costs should be incurred; saying that Miss *Morton* did not desire to retire from the trust, but that he was willing to do so, and stating that he had written to his friend Mr. *Farmer*, who was a solicitor's clerk, to attend to the business on his behalf.

On the 11th of February, *J. D. Peard* answered thus:—"I do not quite like your placing Mr. *Farmer* between myself and you, as I have every wish to look after your interests and those of your wife and children as closely as we can do."

On the 13th of February, *C. B. Luddy* replied, suggesting Mr. *Farmer* as trustee in his stead; saying he was aware he was not a solicitor; and suggesting that *J. D. Peard* and Mr. *Farmer* should consult together, and that the Court should be pressed to pay off the £500 mortgage.

On the 18th of February, *J. D. Peard* replied that it would be better that things should remain as they were, as both trustees did not retire. That letter contained the passage:—"Mr. *Sperring* cannot interfere in any way with the trust or you in the matter of the trust. I fancy as the property when it comes to be divided amongst the children will be some £5000 or £6000, or ought to be, that some one in rather a higher position than Mr. *Farmer* would be a more suitable person."

From that time the correspondence between *C. D. Luddy* and *J. D. Peard* was frequent, the one writing and the other answering throughout as client and solicitor. The Court required the appointment of new trustees, and that was carried out by appointing Mr. *Farmer*. On the 23rd of April, 1880, *J. D. Peard* wrote that he would do his best to push the matter on. And his idea of doing that seemed to have been to concur in a suit instituted in the name of *C. B. Luddy's* infant children for the administration of the estate; and in it *J. D. Peard* entered appearances as solicitor for the Defendants. The Court, however, put a stop to that proceeding, which could only have had the effect of imposing perfectly useless costs upon the small property.

When the suit was stayed *J. D. Peard's* clerk said to Mr. *Farmer*

that it was a good job, as it was doubtful whether *C. B. Luddy's* children took any interest under the will. In the meantime, as extracts from his books and his evidence in Court shewed, *J. D. Peard* was, as he had in his letters informed *C. B. Luddy*, in constant communication with Mr. *Sperring*, with the object of purchasing the bankrupt's estate, and obtaining his discharge on the annulment of the bankruptcy. It was quite clear that he represented to Mr. *Sperring* that he was negotiating on behalf of the bankrupt and his wife and children. On the 23rd of November, 1880, *J. D. Peard* wrote to Mr. *Sperring*:—"I will take your proposals into consideration, and write to Mr. *Luddy* on the subject." On the same day he wrote a letter to *Luddy*, which his clerk said was sent enclosed in one to Miss *Morton*, with whom Mr. and Mrs. *Luddy* were living near *Boulogne;* but *Luddy* denied that he ever received that letter. On the 6th of December, 1880, and on the 4th of January, 1881, Mr. *Sperring* wrote, asking if any answer had been received from *C. B. Luddy*, and on the 5th of January, 1881, *J. D. Peard* replied that he had received none, and added: "I scarcely know what to do about finding a purchaser, as he has not answered." Mr. *Sperring* replied on the 13th of January thus:—"I think it would be to your client's interest to respond to my suggestion." It was strange that *J. D. Peard* did not write again to *Luddy* asking for an answer. He wrote occasionally to Miss *Morton*, but seemed not to have corresponded with *Luddy* until on the 13th of May the latter wrote saying that his sister might feel disposed to pay off the incumbrances, and asking for a statement of them, and the exact position of the estate. On the 23rd of May *J. D. Peard* sent a statement, the short effect of which was that there were three mortgages: Mrs. *Freeman's* for £500; his own charge for between £40 and £50 costs; and the mortgage to the trustees for £720 or thereabouts. Three policies, viz.: for £525;' for £650; and the third for £150 effected on the 22nd of November, 1878, to secure the expenses of the abortive proceedings for liquidation. The income of the property he stated to be £163, and pointed out that should the annuity fall in any surplus income would belong to the trustee in bankruptcy. Further correspondence ensued, and in a letter dated the 13th of June, 1881, *J. D. Peard* wrote thus:—

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"It seems to me that I could settle with Mr. *Sperring* and obtain your discharge for about £150 or £200, which is probably about the value of your interest under your mother's will, which Mr. *Sperring* desires to sell. Do you think your sister would advance this sum on condition that your bankruptcy was annulled? I am afraid the longer the matter rests the more it will cost."

There was no answer to that letter. It might be inferred that the sister hesitated about doing so much. On the 20th of September, 1881, Mr. *Devonshire*, or one of his clerks, had an interview with *J. D. Peard* as to the renewal of his offer of the 20th of October, 1879, which was:—"If Mr. *Luddy's* discharge were agreed to be granted I might get a purchaser for £50."

J. D. Peard requested to see a copy of his former letter, which was supplied, and on the 21st of September, 1881, he wrote to Mr. *Devonshire* thus:—"Provided the trustee obtains the approval of the Court to the sale, I will renew my offer on the terms of my letter of the 20th of October, 1879. Let me know within a fortnight if it is accepted." Mr. *Devonshire* said he sent that to Mr. *Sperring*, who then negotiated directly with *J. D. Peard*.

On the 10th of October, 1881, at an interview with Mr. *Sperring*, the price was fixed at £75, provided the Court consented. On the 11th Mr. *Sperring* stated that Mr. *Devonshire* had agreed to take £25 for his costs, and after several further interviews with Mr. *Sperring* and Mr. *Devonshire*, or his clerk, it was arranged on the 7th of November that the price should be £77 12*s.* 6*d.*, and *J. D. Peard* wrote to Mr. *Sperring* to that effect. Out of that sum £25 was to be paid to Mr. *Devonshire* for costs, and £2 12*s.* 6*d.* for one moiety of the costs of applying to the Court of Bankruptcy. During that time *J. D. Peard* was corresponding with Miss *Morton*, but he said nothing to her or to *C. B. Luddy* about the transaction.

Mr. *Devonshire* said that he supposed *J. D. Peard* was the purchaser, but that he was buying on behalf of *C. B. Luddy's* family. On the 23rd of October *J. D. Peard* wrote to his brother, *William Peard*, stating shortly what he was buying, and that he did not wish to take the purchase in his own name for reasons which he could explain, and asking him to be trustee. In that letter he stated that *C. B. Luddy's* estate "dies with him." Meanwhile

Mr. *Sperring*, on the 10th of November, told Mr. *Devonshire* that Mr. *Buckler* would act for him in future. Mr. *Buckler* stated that he acted for Mr. *Sperring* as a friend at his request, and he sketched affidavits for an application to the Court of Bankruptcy for its sanction to the sale, but he advised, as stated in his letter of the 24th of November, 1881, that there was no necessity for such application, and the Registrar of the *Greenwich* County Court refused to interfere, saying that Mr. *Sperring* could sell without any sanction.

Mr. *Buckler* and another person then signed a pretended resolution of a committee of inspection of the bankrupt's affairs sanctioning the sale. It was admitted that there was no meeting of the committee, and thus no such resolution was ever passed. The transaction was carried out on the 29th of November, 1881, by an assignment from Mr. *Sperring* to *William Peard*, brother of *J. D. Peard*. The draft of the assignment was prepared by *J. D. Peard* and approved by Mr. *Buckler*, who appended a note that he was unable to say whether the recitals were correct. In his evidence he said that he was not acquainted with the state of the property. He also said that if he had been reminded of his query as to the meaning of the will at the meeting of creditors of the 15th of July he should not have approved of the transaction without more consideration. The money was paid, £25 to Mr. *Devonshire*; £50 to Mr. *Sperring*; the balance for costs. Mr. *Sperring* had not accounted for the £50. He had since become insolvent—in June, 1884. In the meantime, and before the completion of the transaction, Mr. *Hemsworth*, a friend of *C. B. Luddy*, arrived from *Boulogne*, and on the 28th of November, 1881, called at the office of *J. D. Peard*, and there saw his clerk, *Alfred Rye*, who gave evidence in the case. He knew all about the transaction with Mr. *Sperring*, the contract for which had been made on the 7th of November, and was to be carried out next day, but of that he said not one word to Mr. *Hemsworth*. He also was aware that Mr. *Hemsworth* mistook him for *J. D. Peard*, and he did not undeceive him. Mr. *Hemsworth* had come to negotiate for the purchase of the property by himself on behalf of Mrs. *Luddy* and her children. He offered £100, and was asked by Mr. *Rye* to put the offer in writing. He wanted Mr. *Sperring's*

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address. Mr. *Rye* said that he had not got it. Mr. *Rye* said that he understood that Mr. *Hemsworth* was negotiating for a purchase from the trustee in bankruptcy, and then he allowed him to leave in the belief that the trustee had the property for sale. On the 3rd of December, 1881, Mr. *Hemsworth* wrote to *J. D. Peard* offering £100 for the interest of the bankrupt and the policy of £150, and to pay *J. D. Peard's* costs as his own solicitor. *J. D. Peard* answered on the 6th of December that if the estate should be offered for sale he hoped to bear in mind Mr. *Hemsworth's* desire to purchase, but that he did not see any chance of his present offer being accepted.

Mr. *Hemsworth* replied on the 8th of December thus:—"I think it the interest of your client as well as that of the infants that I should purchase," and he suggested that he could instruct *J. D. Peard* to buy for him. On the 10th of December *J. D. Peard* answered that the estate had been sold, not saying to whom. Between the 12th of December, 1881, and the 13th of January, 1882, there was correspondence between *C. B. Luddy* and *J. D. Peard*, and between *J. D. Peard* and Mr. *Hemsworth*, on the subject of the purchase, and then two more interviews took place between Mr. *Hemsworth* and *J. D. Peard*. A draft assignment was prepared, but the matter went off because *J. D. Peard* wished to be trustee of the deed, and Mr. *Hemsworth* would not agree to that. The matter was put into the hands of Messrs. *Poole & Hughes*, and they communicated with *J. D. Peard*, and he, on the 31st of January, wrote to Miss *Morton*, and on the 8th of March, 1882, to Mr. *Hemsworth*, and then, on the 3rd of April, 1882, *C. B. Luddy* and Mr. *Farmer*, the trustee, called on *J. D. Peard* and endeavoured to induce him to persuade his brother *William* to sell to Miss *Luddy*. *J. D. Peard's* terms had, however, risen, and after some negotiation and another interview between the parties *J. D. Peard* said that his brother would take £200.

On the 30th of October, 1882, *J. D. Peard* issued a writ, in the name of his brother *William Peard*, in an action of "*Peard* and *Morton* against Miss *Morton*, Mr. *Farmer*, and the children of *C. B. Luddy*, for the administration of the trusts of Mrs. *Luddy's* will." The pleadings did not disclose his interest, and so anxious was he to conceal it that in the brief for counsel at the hearing

he stated that he was really the purchaser, but had evaded discovery of that and did not wish to be a party to the action; and in the draft of that brief, which had been produced, it was stated that neither the Plaintiffs nor Mr. *Peard* wished to go into the witness-box, if it could be avoided; but that seemed not to have been copied into the brief delivered. It was there stated, however, that no question as to construction did really arise till the commencement of that action. It was also stated in an interlineation in *J. D. Peard's* handwriting that at the time of Mrs. *Freeman's*, "and the previous loan to Mr. *Luddy* it was considered best to treat his interest as one for life." The brief contained an argument in favour of construing the will to give an absolute interest to *C. B. Luddy*, which in the draft was all in *J. D. Peard's* handwriting. On the trial of that action in November, 1883, the Court determined that according to the true construction of the will *C. B. Luddy* became entitled upon the death of his mother to an absolute interest in the property. The present action was commenced on the 3rd of July, 1884, by the trustee of the property of *C. B. Luddy*, a bankrupt, against *William Peard*. A new trustee in bankruptcy was subsequently appointed. On the 15th of July an examination of *J. D. Peard* was taken in the bankruptcy which disclosed that he was the real purchaser. The writ in the action was then amended by making him a co-Defendant. But before doing that a letter was written on the 22nd of July, 1884, by the Plaintiff's solicitors, offering that if he would reconvey the property and account for his receipts, to repay the money paid to Mr. *Sperring* with interest at £4 per cent. Subsequently a further offer was made to repay any sum properly expended on the property and interest at £4 per cent. On the 19th of October *J. D. Peard* offered, on the charges of fraud and misrepresentation being withdrawn, to pay the creditors 20*s.* in the pound. On the 22nd of October he offered to reconvey on payment of everything he claimed with £4 per cent. interest, each party to pay his own costs. The negotiation went off eventually upon the question of costs. The action now came on to be heard as one with witnesses; and the hearing of it occupied the greater part of five days. At the conclusion of the arguments judgment was reserved.

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Finlay, Q.C., and *Cordery*, for the Plaintiff:—

The evidence clearly shews that the Defendant, *J. D. Peard*, who acted as solicitor for *C. B. Luddy*, was fully aware at the time of the purchase from the trustee in bankruptcy that the construction of the will was doubtful, and that *C. B. Luddy's* interest under it might be an absolute interest. *J. D. Peard* considered, too, that the property was more valuable than appeared from the rental it produced; and yet he represented to Mr. *Sperring* that *C. B. Luddy's* interest was only for his life, and that it was of little or no value, though the evidence shewed that it was at least worth £200. He concealed facts in regard to the rental, not shewing the real value of the property: and it should not be forgotten that he had acquired all the information which he possessed, and upon which he acted, as solicitor for *C. B. Luddy* and for the trustees of the will. It is also clear that *J. D. Peard* could not take advantage of the information so acquired, and enter into a contract to purchase the property, which he did, and at an undervalue: *Coles* v. *Trecothick* (1).

[KAY, J., referred to *Ex parte James* (2).]

Further, *J. D. Peard* was, as appears from the evidence, negotiating for the purchase from Mr. *Sperring*, as agent, for the benefit of *C. B. Luddy*, his wife and family, and Mr. *Sperring* understood that he was purchasing on their behalf. Both *C. B. Luddy* and his trustee in bankruptcy were entitled to the information which the solicitor and agent possessed, and the transaction should not be upheld, having regard to the concealment of the facts from them. The trustee in bankruptcy can represent *C. B. Luddy's* interest in this action, and can insist upon his rights, and it is submitted that the conveyance of the property should be set aside; or in the alternative, if the transaction should be sustained in favour of the Defendants, that *J. D. Peard* should not be allowed to take more than he throughout represented to both *C. B. Luddy* and Mr. *Sperring* the interest of *Luddy* to be worth, because it is against public policy that a solicitor should obtain a pecuniary advantage at the expense of his client, and as the result of his mistake acting

(1) 9 Ves. 234.

(2) 8 Ves. 337.

professionally: *Bulkley* v. *Wilford* (1), and because, if *J. D. Peard* thought that he was purchasing, and Mr. *Sperring* thought that he was selling an interest for life only, there is clearly a case of mistake, and the mistaken construction of a written document is not a mistake of law within the rule *ignorantia juris neminem excusat: Cooper* v. *Phibbs* (2); *Earl Beauchamp* v. *Winn* (3).

Hastings, Q.C., and *Farwell*, for the Defendant, *J. D. Peard*:—

The bankrupt is not a *cestui que trust* of the surplus of his estate, if any, and the trustee in bankruptcy is in no sense a trustee for the bankrupt: *Rochfort* v. *Battersby* (4); *Ex parte Sheffield* (5); *In re Leadbitter* (6). Though there may have been a fiduciary relation subsisting between *J. D. Peard* and *C. B. Luddy* until the bankruptcy, there was no such relation existing between the former solicitor of the bankrupt and the bankrupt's trustee in bankruptcy; therefore the trustee cannot maintain an action in respect of a breach of duty, as contended, on the part of *J. D. Peard*, to the bankrupt. There was no breach of duty to the trustee in bankruptcy, for the validity of the sale by him could not be affected by any concealment practised upon *C. B. Luddy* by *J. D. Peard*, even if *J. D. Peard* were an agent employed to purchase on behalf of *C. B. Luddy: Fellowes* v. *Lord Gwydyr* (7). Neither was any misrepresentation made to Mr. *Sperring* sufficient to set aside the sale. The statement in regard to the interest being for life only was a misrepresentation of law, and on that ground there can be no relief: *Beattie* v. *Lord Ebury* (8); *Rashdall* v. *Ford* (9); *Midland Great Western Railway of Ireland* v. *Johnson* (10). The statements made as to value were mere estimates, and did not give rise to the contract: *Attwood* v. *Small* (11); *Smith* v. *Kay* (12). A solicitor is not bound to remember all the information which he has acquired in reference to his dealings with property: *Brownlie* v. *Campbell* (13);

(1) 2 Cl. & F. 102; 8 Bligh (N.S.) 111.
(2) Law Rep. 2 H. L. 149.
(3) Ibid. 6 H. L. 223.
(4) 2 H. L. C. 388.
(5) 10 Ch. D. 434.
(6) 10 Ch. D. 388.
(7) 1 Russ. & My. 83.
(8) Law Rep. 7 H. L. 102.
(9) Ibid. 2 Eq. 750.
(10) 6 H. L. C. 798.
(11) 6 Cl. & F. 232.
(12) 7 H. L. C. 750.
(13) 5 App. Cas. 925.

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Walters v. *Morgan* (1). Being in no fiduciary relation to the trustee in bankruptcy, *J. D. Peard* was under no duty to disclose any information which he had acquired to him, as the duty depends upon the relation, which is purely personal, and in this case it ceased to exist when *C. B. Luddy* became bankrupt: *Edwards* v. *Meyrick* (2); *Montesquieu* v. *Sandys* (3); *Cane* v. *Allen* (4); *Knight* v. *Bowyer* (5); *Austin* v. *Chambers* (6).

[KAY, J., referred to *Carter* v. *Palmer* (7).]

The allegations of fraud having broken down, whatever the decision may be, so much of the action as has been founded upon them ought to be dismissed with costs: *Parker* v. *McKenna* (8). It is clear that *J. D. Peard* had no information which *C. B. Luddy* did not possess; and those allegations should not have been made. Under any circumstances, as they were not proved, the Defendants should not be made to pay any costs in respect of them. It is submitted that there has been no decision which has carried the doctrine to the length contended for—that the solicitor acting for the bankrupt was not at liberty to throw off that character and to deal independently and at arm's length with a trustee in bankruptcy; and that no case for rescission of the contract has been established to the satisfaction of the Court.

King, for the Defendant *William Peard*.

Finlay, in reply:—

Though the relation of solicitor and client may have ceased the incapacity of the solicitor continued: *Carter* v. *Palmer* (9); and the solicitor will not be allowed to conceal, which he studiously did, and to use for his own advantage and against *C. B. Luddy's* trustee in bankruptcy, information which he acquired in his capacity of solicitor to *Luddy*. The duty of a trustee in bankruptcy is to realize the estate in the interest of all the creditors and of the bankrupt, and the bankrupt is interested beneficially in any surplus which there may be. [He also referred to the case of *McPherson* v. *Watt* (10).]

(1) 3 D. F. & J. 718.
(2) 2 Hare, 60.
(3) 18 Ves. 302.
(4) 2 Dow. 289.
(5) 2 De G. & J. 421.
(6) 6 Cl. & F. 1.
(7) 8 Cl. & F. 657.
(8) Law Rep. 10 Ch. 96.
(9) 8 Cl. & F. 657, 706.
(10) 3 App. Cas. 254.

1886. June 26. KAY, J. (after giving the facts above set forth, continued) :—

I have stated these facts at length because the questions they raise can only be solved by a very careful examination of them. One of these questions is, whether the confidential relation of solicitor and client with respect to this property had come to an end between *C. B. Luddy* and *J. D. Peard*, before the purchase. For reasons which I will state afterwards I do not regard that as an essential—though doubtless it is an important—circumstance. *J. D. Peard* admitted that no formal close of the relationship ever took place. He was in frequent correspondence with *C. B. Luddy*, advised him as to the chance of his obtaining a discharge; was employed on his behalf to endeavour to effect a purchase of this very property from the trustee in bankruptcy for the benefit of *C. B. Luddy's* wife and family, and when *C. B. Luddy* suggested that Mr. *Farmer* should act for him, *J. D. Peard* on the 11th of February, 1880, wrote the letter from which I have quoted objecting to "your placing *Farmer* between myself and you" in terms which shew plainly that he desired that no one but himself should act as adviser of *C. B. Luddy* in the matters relating to the property. It has been gravely argued that a bankrupt cannot have a solicitor. If that means that a bankrupt has nothing wherewith to pay for professional services it may be intelligible, but why a bankrupt should not have relations of confidence with a solicitor, just as he might have with a spiritual adviser or a doctor, I do not in the least understand. I have no doubt that such a relation existed in this case at the time when the purchase was made.

The next and a very important question is, whether during the professional relation *J. D. Peard* acquired any knowledge or belief as to the property which he was bound to communicate to *C. B. Luddy* before he could have bought the property from him, supposing that he had not become bankrupt. Stress has been laid upon the representation made by *J. D. Peard* to the trustee in bankruptcy, or to his solicitor, and to *C. B. Luddy* himself, to each of whom *J. D. Peard* represented that *C. B. Luddy's* interest was a life interest only, and as having no saleable value. I have said during the argument that I do not believe

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he had any intention to mislead. He had not formed the design of buying for himself when he made those statements, and probably they were not intended as anything but a short summary of the effect of the opinion of counsel which he had obtained. But it is quite clear that before the purchase his professional skill had led him to believe that the construction of the will was doubtful, and that it was possible that *C. B. Luddy's* interest was after all an absolute one, which would be worth instead of £213 more like £2000 at least. I must infer that this belief existed not later than the conversation between his clerk and Mr. *Farmer*, on the staying of the administration action, a conversation which there has been no attempt to deny. Now I have looked in vain for a trace of any communication of that belief to *C. B. Luddy*, or to the trustee in bankruptcy, or to his solicitor. It is also certain that from having had to consider the condition of the property when negotiating mortgages for *C. B. Luddy*, *J. D. Peard* had formed an opinion that it was more valuable than appeared from the rental, which he spoke of as a ground rent, and said in his answers to requisitions was "nothing like the full value," though on the 18th of February, 1880, in a letter to *C. B. Luddy* he stated that the property when it came to be divided among the children would, he fancied, be some £5000 or £6000, or ought to be. I cannot find any proper disclosure of this opinion to *C. B. Luddy*, while to Mr. *Sperring*, and his solicitor, *J. D. Peard* constantly affirmed that *C. B. Luddy's* interest was valueless.

To sum them up shortly, the inferences which I draw from the facts are: that from a time anterior to the death of the testatrix until after his purchase from Mr. *Sperring*, *J. D. Peard* acted as solicitor for *C. B. Luddy* in respect of this property. In the course of that employment he was called upon to consider carefully the extent of *C. B. Luddy's* interest under the will. He evidently formed an opinion that it was probably an absolute interest, and not merely the practically nothing more than a life interest described in his letter of the 11th of December, 1876, and in his answers to requisitions in 1877, and his subsequent communications with *C. B. Luddy* and his trustee. In the course of the same employment he also formed an opinion that the property was more valuable than the actual rental shewed. He did not disclose his opinion on

these points either to *C. B. Luddy*, or to his trustee, or to the trustee's solicitor. When negotiating as solicitor for *C. B. Luddy*, he found that Mr. *Sperring* could be induced to sell for a very small sum. He availed himself of his knowledge during his negotiation for *C. B. Luddy's* family to buy secretly for himself, in the name of his brother *William Peard*, for £77—property which was in fact worth some thousands of pounds.

What is the law which is applicable to such a state of circumstances? In *Carter* v. *Palmer* (1), where one who had previously been employed as confidential legal adviser, after that employment had ceased, bought up charges on his former employer's estate, concerning a compromise as to which he had been consulted, the general doctrine is stated by Lord *Cottenham* thus (2): "As agent, he necessarily became acquainted with all the circumstances connected with these securities, and most particularly with the means which existed of providing for the payment of them. In advising the Respondent as to compounding for these claims, and from his knowledge of what had subsequently taken place, he was aware that the claims might actually be bought up for much less than their nominal amount and their actual worth. What enabled him to purchase these claims for a sum little more than one third of their actual value, but the information he had acquired as agent or counsel for the respondent? Such information, therefore, was applied by him to defeat the negotiation in which he had himself been engaged for his client or employer, and, by substituting himself in the place of *Mackmurdo*, to deprive such client or employer of the benefit of a compromise, which he had been endeavouring to effect, and which the terms of the purchase proved to be feasible. From the earliest times down to the latest case in which I believe the subject has been discussed, which is *Taylor* v. *Salmon* (3), the rule in Equity has been always recognised which would prevent a person in the situation of the appellant making such a purchase for his own benefit whilst he continued to act as agent. As the reason for this disability continues to operate after the employment has ceased, the disability itself must continue, unless a contrary rule has been established by decisions. But this

(1) 8 Cl. & F. 657. (2) 8 Cl. & F. 705.
(3) 4 My. & Cr. 139.

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is not the case, but the very reverse. In *Coles* v. *Trecothick* (1) Lord *Eldon* does not say that it is sufficient for the party buying to divest himself of the character of trustee, but that he must do so 'by an unqualified authorized contract for liberty to buy.' In *Ex parte James* (2), Lord *Eldon* refused to permit a solicitor to become a purchaser, who had ceased to act as such, upon the ground that whilst acting as solicitor he had procured all the information that might be useful to him; and he again repeats the rule that to enable a person who had held a confidential situation previously to the purchase, to become a purchaser, he must shew that he 'had at the time of the purchase shaken off that character by the consent of the *cestui que trust*, freely given after full information, and bargained for the right to purchase.' The several cases which have occurred in which solicitors have been restrained from acting against their former clients, or communicating information acquired in such employment, proceed upon a principle which governs this case: for it cannot be contended that they are to be at liberty to use for their own benefit, and to the prejudice of their former clients, information acquired whilst acting for them, which they are not permitted to communicate or to use for the benefit of others."

These words of Lord *Cottenham* apply very closely to the present case. It is observable that the basis of the doctrine is that such a state of circumstances puts the agent, who has by means of his agency obtained information which gives him an advantage over the principal in the transaction, under a personal disability to maintain that advantage to the prejudice of the principal. Putting aside the circumstance of secrecy, and supposing *C. B. Luddy* not to be bankrupt, the case would be one in which *J. D. Peard* could not have maintained such a purchase from *C. B. Luddy* himself unless he could shew that he had made a full communication to his client of all he knew or believed respecting the property, and, as Lord *Eldon* said in *Gibson* v. *Jeyes* (3), had given his client all that reasonable advice against himself that he would have given against a third person. If while negotiating for his client he had secretly bought for himself, the case would be much stronger. In

(1) 9 Ves. 247. (2) 8 Ves. 352.
(3) 6 Ves. 266.

Lewis v. *Hillman* (1) Lord *St. Leonards* said: "I should lay it down as a rule, my Lords, that ought never to be departed from, that if an attorney or agent can shew he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction, to stand, must be open and fair, and free from all objection." Those words were referred to with approval by Lord *Cairns*, in the case of *McPherson* v. *Watt* (2), a case which in some of its circumstances bears a close resemblance to the present. Lord *Cairns* said (3): "An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest; that he has not misrepresented anything, or concealed anything; that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist." And Lord *Blackburn* said (4): "All those branches of the profession are pursued by writers in *Scotland*, and by attorneys and solicitors in *England*, and they all necessarily involve this, that the writer or the attorney must stand towards his client in a position in which there has been, or there is, confidence more or less reposed in the attorney by his client. It has often been said that that circumstance does not render it impossible for an attorney to purchase property from his client, and that the mere fact of his being an attorney purchasing would cast upon him no more

(1) 3 H. L. C. 607, 630.
(2) 3 App. Cas. 254.
(3) 3 App. Cas. 266.
(4) Ibid. 270.

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duty than would be cast upon a person in any other profession. If he purchases from his client in a matter totally unconnected with what he was employed on before, no doubt an attorney may purchase from one who has been his client just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger. In some cases it may turn upon this; that the attorney having been the general agent of the seller, has acquired an intimate knowledge of the condition of the property, and not only learnt as much as the seller himself knows, but perhaps a good deal more. In those cases he has acquired the knowledge as being the general agent of the vendor, and he has an unfair advantage in consequence, and there must not be an abuse of the knowledge which he has so acquired."

But it was argued in the present case that although a solicitor or other agent may not avail himself of information obtained during his employment to obtain a good bargain from his client, the rule does not apply if the client has become bankrupt and the purchase is from the trustee in bankruptcy. Taking the familiar illustration, if the agent becomes from his employment aware of the existence of a coal mine under his employer's land of which the employer is ignorant, though he could not purchase from the employer without disclosing that, it was said he may do so from his trustee in bankruptcy. I entirely dissent from that argument. The test is whether the purchase would be a benefit obtained to the prejudice or at the expense of the client. In this case it is possible that the property may produce enough to pay all the creditors and leave a balance for the bankrupt. Even if not, it would pay a considerable dividend to the creditors. Is it no injury to the client that the solicitor should put this money into his own pocket instead of paying it to the bankrupt, or to his creditors? Reliance was placed on those cases in which, where a bankrupt has attempted to interfere with the assignee or trustee, it has been held that the bankrupt is not a *cestui que trust*

for that purpose. But in many respects the trustee represents him, and has duties to him, as Lord *Eldon* said in *Ex parte James* (1); the assignees are "to do their duty to the creditors; always remembering also their duty to the bankrupt; if by a fair, prudential, and cautious dealing with the estate a surplus can be secured." In *Wearing* v. *Ellis* (2) the Lord Chancellor, quoting Sir *W. Grant*, said: "From the moment that the debts are paid the assignees are mere trustees for the bankrupt, and can be called upon to reconvey to him." And he added that the trustee can be called upon in the Court of Chancery to convey. In *Adams* v. *Sworder* (3), where the bankruptcy had been annulled, the former bankrupt obtained a decree setting aside a sale by the assignee in which his solicitor was interested. In my opinion the trustee represents and stands in the place of the bankrupt for this purpose, viz., that the solicitor could not be allowed to hold as against the trustee an advantage obtained by him on a purchase from the trustee by means of the knowledge which he had gained whilst solicitor for the bankrupt. On this ground alone I should be prepared to hold that *J. D. Peard* must give up to the new trustee in bankruptcy every advantage of this purchase.

But there are other reasons which seem to me to make the case stronger. Undoubtedly from the 20th of October, 1879, *J. D. Peard* always represented himself to Mr. *Sperring* and to Mr. *Devonshire* as negotiating to purchase, not on his own behalf, but on behalf of the friends of *C. B. Luddy*. It is quite clear that he was employed by *C. B. Luddy* so to negotiate, and the correspondence shews he accepted that employment. That was a deception which would make it difficult to maintain the purchase against the trustee. The trustee was a needy man, entirely without advice in the matter. The draft assignment prepared by *J. D. Peard* was returned, with a note upon it by Mr. *Buckler* that he knew nothing about the recitals; and Mr. *Buckler*, who professed to act as his solicitor in the matter, has said that he would not have allowed the matter to proceed if he had remembered his former query as to the effect of the will.

Now put all these facts together. The solicitor of the bankrupt,

(1) 8 Ves. 346. (2) 6 D. M. & G. 596, 603.
(3) 2 D. J. & S. 44.

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having as such solicitor acquired an intimate knowledge of the nature and value of this peculiar property concerning which he had acted as solicitor and receiver for years, was employed by the bankrupt to negotiate with the trustee in bankruptcy for the purchase of it, which the bankrupt hoped to induce his sister to carry out for the benefit of his wife and children. The solicitor negotiated accordingly, never suggesting to the trustee that he intended to buy for himself, but giving the trustee and his solicitor to believe that the purchase was by and on behalf of the bankrupt's family. He discovered that the trustee, being a needy man, was ready to conclude the matter for a very small sum, considerably less than he had represented to his client, and then, concealing the matter altogether from his client, and concealing from the trustee and his solicitor that he was buying on his own account, he completed the purchase in the name of his brother; and when he was compelled to disclose that the property had been sold, he represented to the bankrupt that the purchase was really by his brother, and still concealed, until forced by an examination in bankruptcy to disclose it, his own interest in the purchase. In my opinion such a transaction cannot be supported in Equity, and I must declare the Defendants to be trustees of all the advantage of this purchase for the trustee in bankruptcy of *C. B. Luddy*.

Then I must consider the terms on which this equitable relief should be granted. There must be an account of the purchase-money paid, with interest at £4 per cent. from the time of payment; also an account of all moneys due to *J. D. Peard* upon the securities given to him by *C. B. Luddy*, and of all outlay by him in improvements, with interest at £4 per cent. As I think that the Defendant, *J. D. Peard*, has been entirely in the wrong, I must order him to pay the costs of the action. Some of the charges of misrepresentation have not, I think, been proved; but I cannot under the circumstances wonder that they were made. They have not increased the costs, and I cannot make any deduction on that account. Probably the best course will be to direct a taxation of the Plaintiff's costs, and to set them off *pro tanto* against whatever may be found due to *J. D. Peard* on the account. Subject to that, and to the payment

of the balance, if, any, to *J. D. Peard*, the Defendants must be ordered to convey the property, and to hand over the deeds to *C. B. Luddy's* trustee. If the trustee is entitled to any general account and taxation of the costs of *J. D. Peard* against *C. B. Luddy* outside this transaction, I understand that there is a summons pending under which he may obtain this; and that being the more proper proceeding, I do not direct such an account in this action. A technical objection was taken to the frame of the action. Part of this, relating to the absence of evidence as to the leave of the Court of Bankruptcy having been obtained, was not raised by the pleadings. The rest was merely as to joining the bankrupt with his trustee as co-Plaintiff. This in the view which I have taken of the rights of the trustee in bankruptcy becomes immaterial; but I observe that such a joinder of plaintiffs seems to have been sanctioned by the Court of Appeal in the case of *Emden* v. *Carte* (1).

Solicitors: *Woodrooffe, Burgess, & Loch; J. D. Peard.*

T. F. M.

In re BARRINGTON. GAMLEN *v.* LYON.

[1886 B. 2098.]

Minerals—Settled Estate—Coals won by innocent Trespassers—Coals required for Support of Railway—Compensation Moneys—Capital or Income—Successive Tenants for Life—Remaindermen.

Minerals were devised by will upon trust for *B.* for life without impeachment of waste, with remainder on trust for the Defendant for life without impeachment of waste, with remainders over.

During the life, and also after the death of *B.*, part of these minerals were won by instroke by the owners of adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—

Held, that the moneys paid in respect of the minerals so won during the respective lives of *B.* and the Defendant, belonged to the estate of *B.* and to the Defendant respectively.

The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of *B.*, the

(1) 17 Ch. D. 768.

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lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—

Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the Defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under the 74th section of the *Lands Clauses Consolidation Act*, 1845.

ORIGINATING SUMMONS.

Francis Lyon Barrington was owner in fee of certain coal mines at *Binchester* in the county of *Durham*, but not of the surface above such mines. These coal mines were worked at certain royalties under a lease granted by Mr. *Barrington* for a term of thirty-one years from the 1st of May, 1872. By his will, dated the 1st of December, 1876, Mr. *Barrington* devised his collieries at *Binchester* (subject to a mortgage and an annuity) to trustees upon trust for the Dowager Viscountess *Barrington* for life without impeachment of waste, and after her death for the Defendant, the Hon. *Francis Bowes Lyon*, for life without impeachment of waste, with limitations over. The testator died on the 15th of January, 1877, and Lady *Barrington* died on the 23rd of March, 1883.

During her lifetime and after her death certain of the coal was got by the owners of neighbouring collieries working by instroke from their collieries, such neighbouring owners having inadvertently thus trespassed beyond their proper boundaries. This working began in October, 1882; the mistake was discovered in December, 1884, when the working was discontinued, and the neighbouring owners subsequently paid the sum of £839 7*s.* 2*d.* as compensation for the coal which they had thus gotten.

A line of railway belonging to the *North Eastern Railway Company* passes across the surface of the lands over a portion of the *Binchester* collieries. In the month of June, 1884, the lessees of those collieries gave notice to the railway company that they were desirous of working and taking away the coal lying under and adjoining a portion of the railway. The company gave a counter-notice that this coal was required for the support of the

railway, and they ultimately paid compensation moneys for the coal so left unworked, of which the sum of £136 0*s.* 2*d.* was apportioned as being paid in respect of the lessor's interest therein.

This was an originating summons taken out by the trustees of the will for the purpose of having the respective rights of themselves, Mr. *F. B. Lyon,* the equitable tenant for life in possession, and Viscount *Barrington,* as the executor of Lady *Barrington,* the late equitable tenant for life, in these two sums of £839 7*s.* 2*d.* and £136 0*s.* 2*d.* determined by the Court.

Theobald, for the trustees, in support of the summons:—

The life estates here are only equitable; the severed minerals therefore vest at law in the trustees. That being so, the question to determine is what is the equitable way of dealing with these moneys. Then, inasmuch as these minerals could not have been gotten by the tenants except through their lessees, whose workings would have been spread over a series of years, the remaindermen ought to have some share in these compensation moneys.

There is no authority upon a question of this kind as to minerals. The analogy of timber will not hold good, because there comes a time when timber must be felled in a due course of husbandry, and there is no limit to the quantity which may have to be felled at one and the same time. As to the application of the proceeds of the sale of timber, he referred to *Lowndes* v. *Norton* (1); *Baker* v. *Sebright* (2); *Honywood* v. *Honywood* (3).

With regard to the £136 0*s.* 2*d.* paid by the railway company, the 74th section of the *Lands Clauses Consolidation Act,* 1845, governs the case, and that sum must be applied, so as to give the parties interested the same benefit as they might have had from the reversion in respect of which the money was paid. On this point he referred to *Askew* v. *Woodhead* (4).

D. Sturges, for Mr. *F. B. Lyon*:—

The principle applicable to the sum of £839 7*s.* 2*d.* is this:—The tenants for life were both unimpeachable for waste, and each

(1) 6 Ch. D. 139.
(2) 13 Ch. D. 179.
(3) Law Rep. 18 Eq. 306.
(4) 14 Ch. D. 27.

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of them, with the consent of the lessees, could have leased these minerals. Some one without their leave, has severed these minerals from the inheritance and won them; thus doing what they could have permitted him to do, and his acts have been adopted both by the lessees and lessors, who have agreed to accept compensation. Accordingly the lessors' share of the compensation moneys belong to the tenants for life, and as the working by the adjacent owners took place partly during the life of the late, and partly during the life of the present tenant for life, the sum of £839 7*s.* 2*d.* should be divided between them, so as to give to the representative of the late tenant for life such part of it as represents the value of the coal gotten during her life tenancy, and to give to Mr. *Lyon* the value of the coal gotten during his life tenancy.

Upon this question he referred to *Lowndes* v. *Norton* (1); *Waldo* v. *Waldo* (2); *Phillips* v. *Barlow* (3), and *Jodrell* v. *Jodrell* (4).

[KAY, J., referred to *Pigot* v. *Bullock* (5), and *Tudor's* L. C. Real Property (6).]

Upon the second question, the whole of the £136 0*s.* 2*d.* paid by the railway company belongs to Mr. *Lyon*, because his right of severing the minerals it represents from the inheritance has been destroyed. These minerals were coal supporting other minerals; they are now minerals supporting a railway; so they have ceased to be part of the estate, and the tenant for life cannot get them though he is unimpeachable for waste: *Great Western Railway Company* v. *Smith* (7).

Phipson Beale, for the representative of Lady *Barrington*.

Theobald, in reply.

1886. July 3. KAY, J. (after stating the facts with reference to the coal won by the innocent trespass of the owners of adjoining collieries, continued):—

The question is to whom the moneys in respect of such trespass

(1) 6 Ch. D. 139.
(2) 12 Sim. 107, 113.
(3) 14 Sim. 263.
(4) Law Rep. 7 Eq. 461.
(5) 1 Ves. 479, 484.
(6) 3rd. Ed. p. 108.
(7) 2 Ch. D. 235; 3 App. Cas. 165, 178.

belong. The point seems to be completely determined by authority. No doubt, if a tenant for life who is impeachable of waste improperly commits waste by cutting trees or digging minerals, such trees or minerals when severed become at once the property of the owner of the first estate of inheritance *in esse*: *Uvedall* v. *Uvedall* (1); *Whitfield* v. *Bewit* (2); *Bewick* v. *Whitfield* (3). And in such case an intermediate tenant for life without impeachment of waste cannot recover the proceeds in trover: *Pigot* v. *Bullock* (4). The reason for this seems to be that he had no right to the timber cut before his estate came into possession.

The same law applies if the timber be severed by the act of God, as by tempest, or by a trespasser: see *Bewick* v. *Whitfield.*

On the other hand, if the severance be in the lifetime of a tenant for life who is unimpeachable of waste the severed portion of the inheritance belongs to such tenant for life. In an *Anonymous Case* in *Moseley* (5), the Master of the Rolls stated: "It is now settled at law that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is dispunishable of waste, and not to the remainderman in tail, or in fee." This was followed by Lord Chief Justice *Mansfield* in *Pyne* v. *Dor* (6), who said, "that a tenant for life without impeachment of waste, has a right to the trees the moment they are cut down."

And in *Bagot* v. *Bagot* (7) and on appeal (8) the law as to timber and minerals is treated as being precisely identical.

I am, therefore, of opinion that the proceeds of the minerals worked during the respective lifetimes of Lady *Barrington* and the Defendant belong to her estate and to the Defendant respectively.

Another question arises thus: A railway belonging to the *North Eastern Railway Company* passes over a portion of the mine. In June, 1884, the lessees gave to the railway company notice that they were desirous of working the coal lying under and adjoining a portion of the railway. A counter-notice was

(1) 2 Roll. Abr. 119.
(2) 2 P. Wms. 240.
(3) 3 Ibid. 267.
(4) 1 Ves. 479, 484.
(5) Page 238.
(6) 1 T. R. 55, 56.
(7) 32 Beav. 509.
(8) 33 L. J. (Ch.) 122, n.

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given, and eventually a compensation to be paid by the railway company was assessed at £514 17*s.* 11*d.*, of which the lessor's proportion was to be £136 0*s.* 2*d.*

I have to determine under the 74th section of the *Lands Clauses Act* who is entitled to the latter sum. I quite agree that under that section it is the duty of the Court to consider all the circumstances, and if the coal for which compensation was thus received was of such an extent that by no possibility it could be gotten during the lifetime of the existing tenant for life it seems to me that might be a circumstance which the Court might have to regard in determining the relative rights of the tenant for life and the remainderman; but nothing of that kind occurs here, and I am of opinion that in this case the tenant for life is entitled to the £136 0*s.* 2*d.*, being that part of the compensation which is allotted to the lessor.

Solicitors: *Gamlen & Co.*; *Western & Sons*; *Carlisle, Unna, & Ryder.*

W. W. K.

KAY, J.
1886
June 9;
July 5, 6, 14.

STUDDERT *v.* GROSVENOR.

[1884 S. 1324.]

Company—Powers of Directors—Application of Company's Funds—Payment of Costs of Legal Proceedings—Libels against the Directors—Libels against the Company—Payments for Proxy Papers—Ultrà vires.

The directors of a limited company prosecuted the proprietors of a newspaper for libels impugning their honesty in the management of the affairs of the company. The newspaper proprietors were convicted, the directors paid the costs of the prosecution out of the funds of the company, and such payment was made known to a general meeting held before action brought.

The directors also successfully prosecuted one *B.* for libelling both the company and themselves, and paid the costs of the prosecution out of the funds of the company after action brought.

There were over 15,000 shareholders, and the directors sent to each of them before the general meetings a stamped proxy form containing the names of certain of the directors as proxies and inclosed in a stamped cover for return, and paid the expense of printing, posting, and stamping these forms out of the funds of the company.

In an action by a shareholder for a declaration that such payments were not chargeable against the company:—

Held, first, that as the libels in the newspaper were not direct libels on

the company, the cost of the prosecution ought not to have been paid out of the funds of the company, but that there was no case for an injunction, and, following *Pickering* v. *Stephenson* (1), that the Court ought not to direct repayment by the directors:

Held, secondly, that the costs of the prosecution of *B.*, which was carried on entirely in the interests of the society, were properly payable out of the funds of the company:

Held, thirdly, that the payments for printing and sending out such proxy forms, and for stamping and paying the return postage thereon, were a misapplication of the funds of the company beyond the power of a general meeting to sanction; and that though no repayment of the moneys so paid should be ordered, the directors must be restrained by injunction from using the company's funds in paying the stamps or return postage stamps on any proxy forms, or in paying for the printing or sending out any proxy forms with the names of the proposed proxies therein, or otherwise calculated to influence the votes of the shareholders.

THIS was an action brought by a shareholder of a company entitled the *Army and Navy Co-operative Society, Limited*, on behalf of himself and all other the shareholders of the company, except the Defendants, against the company and such of the directors as were on the board at the time the causes of action arose, claiming a declaration that the costs of certain criminal proceedings for libel instituted by the directors in question against a weekly newspaper called the *Broad Arrow*, and against one *J. P. Barge*, were not chargeable against and ought not to be borne by the company, and that the Defendants might be restrained by injunction from applying any moneys of the company in or towards payment of any such costs or of any future costs that might be incurred on account of the said prosecutions for libel or any similar prosecution: and also claiming a declaration that the costs of stamps, stationery, printing, and other expenses caused by and incidental to the directors procuring proxy papers to be used by them were not properly chargeable to and ought not to be borne by the company, and that the Defendants might be restrained by injunction from using the moneys and property of the company for such purpose.

As to the costs incurred in the proceedings for libel first above mentioned, the facts were as follows:—The *Broad Arrow*, in the year 1879, published on several occasions, sometimes in the form of letters to the editor and at other times by way of editorial

(1) Law Rep. 14 Eq. 322.

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comment, matter impugning the honesty of the directors of the company in connection with the management of its affairs, and in particular published on the 1st of November, 1879, the following letter :—

"*Co-operative Stores*—Sir, I am glad to see you are taking up the cause of the shareholders in the *Army and Navy Stores*. Where does the surplus cash go to? Have any of the directors built new houses lately? I think I can name two. Have any of the directors' wives had handsome presents made them by tradesmen from whom the stores are supplied?

"*Jones*. A shareholder."

The directors being advised that these publications were libellous, caused proceedings to be taken by way of criminal information against Messrs. *A. Ridgway* and *T. G. Ridgway*, the proprietors of the *Broad Arrow*, and applied for a rule *nisi* against them on the 4th of December, 1879, which was afterwards obtained and was made absolute on the 4th of February, 1881, when the Messrs. *Ridgway* were convicted. On the 9th of May, 1881, they were sentenced to pay fines of £50 and £10, but no order was made against them for the payment of costs.

The balance sheet of the 1st of February, 1881, contained an item for legal charges, and at the general meeting at which this balance sheet was presented to the shareholders a question was asked whether these legal charges included any of the costs of the prosecution of the proprietors of the *Broad Arrow*, and an answer was made on behalf of the directors that about £200 of those costs were included.

A similar question was asked at the general meeting of the 31st of March, 1882, as to the item for legal charges contained in the balance sheet then presented, and the chairman of the directors answered, "most unquestionably."

The total costs of this prosecution amounted to £591, which had been all paid out of the funds of the society before the commencement of this action.

In the course of the evidence upon the hearing the secretary of the company stated that these libels were most injurious to the company, and that unless they had been put a stop to the

business of the company could not have been carried on; and Mr. *Lewis*, one of the directors, stated that the directors had been attempting to suppress a dishonest practice amongst their *employés* of accepting commissions, and that if it had been supposed that the directors did anything of the kind they could not have succeeded.

The other costs, the payment of which was complained of, were incurred under the following circumstances:—

J. B. Barge, a discharged *employé* of the company, after writing several offensive letters to the directors, proceeded to walk up and down in front of the stores during the busy time of the day, wearing placards on which was written in large characters—"Public Notice. Beware of the confidence trick party. The *Army and Navy Stores*, 117, *Victoria Street*, is a swindle and counterfeit, and the directors a gang of swindlers and blacklegs," with other abuse to the same effect. On the 13th of February, 1884, while doing this, he was given into custody for causing an obstruction and brought before a magistrate. The magistrate warned him and advised the directors to proceed against him for libel. An offer was made to him on behalf of the company to forgive him if he would promise to desist from further annoyance. This he refused to do, and accordingly he was prosecuted for libel by the directors, and was ultimately convicted and sentenced to a term of imprisonment. The costs of that prosecution amounted to £161, and they had been paid by the directors out of the funds of the company since the commencement of this action.

The facts relating to the issue of and payment for the proxy papers were as follows:—There were a large number of shareholders in the society, amounting to between 15,000 and 16,000, and it had been the practice of the directors to send to each of these shareholders before the general meetings a printed form of proxy impressed with a penny stamp and also with a halfpenny postage stamp, so that each shareholder who did not attend the meeting might if he pleased sign and return the proxy without any expense to himself. These proxy papers were printed and posted, and all the expenses of printing, posting, and stamping them had been from time to time paid out of the funds of the company, the price of the stamps of such of the proxy papers as

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were unused being recovered from *Somerset House*. The proxy forms contained the names of several directors, any of whom might act as proxy for the person signing in the order in which they were named. There was no indication on the face of the proxy that any other name might be inserted, and the form authorized the persons to whom the proxy was given to vote as proxy at the particular meeting and at any adjournment thereof, and also at any poll directed at such meeting or adjournment. According to the evidence these proxy papers were occasionally altered by the shareholder by the insertion of a different name; and the average attendance at each general meeting was about 150 members.

The articles of association authorized in general terms the issue of proxy forms, and according to the evidence the issue and payment made in this case cost the company about £110 per annum.

Pearson, Q.C., and *Colquhoun*, for the Plaintiff:—

The payment of the costs of the proceedings against the proprietors of the *Broad Arrow* out of the funds of the company was wholly *ultrà vires* on the part of the directors, and they are personally liable to make good such payments to the company: *Pickering* v. *Stephenson* (1); *Kernaghan* v. *Williams* (2); *Russell* v. *Wakefield Waterworks Company* (3).

The libels were charges of dishonest conduct on the part of the directors and their wives individually, and though in *Kernaghan* v. *Williams* the Court did not order the moneys which had been applied by the directors in paying the costs of the proceedings in question in that case to be paid by the directors personally, that was because there had been a resolution passed by the shareholders in a general meeting requesting the administration to prosecute those proceedings in the strongest possible manner for the benefit and at the expense of the company; while in this case, though these costs were included in the balance sheet of the 1st of February, 1881, under the general heading of legal charges, there was nothing to call the attention of the

(1) Law Rep. 14 Eq. 322. (2) Law Rep. 6 Eq. 228.
(3) Law Rep. 20 Eq. 474.

meeting to the character of these costs, and there was no resolution whatever passed at the meeting with reference to them. The same principles apply to the payments made by the directors for the costs incurred in the prosecution of *Barge*.

As to the payments for the proxies. A shareholder who cannot or will not attend at a general meeting of a company should, if he wishes to vote thereat, appoint his own proxy at his own expense; and, although a lax practice in this respect may prevail to some extent, such payments are clearly a misapplication of the funds of a company which no general meeting has the power to sanction. Where there is a large body of shareholders, very many of them sign the proxies sent to them as a matter of course, and the result of this practice, if permitted, would be to enable the directors to obtain at the expense of the company a voting power which gives them an absolute control over the affairs of the company.

The Standing Orders of the House of Commons with reference to the consents of proprietors or members of companies in the case of bills originating in that House provide that "no form of proxy shall be stamped before it is sent out, nor shall the funds of the company be used for the stamping of any proxies, nor shall intimation be sent as to any person in whose favour the proxy may be granted, and no . . . circular or form of proxy . . . shall be sent to any proprietor from the office of the company, or by any director or officer of the company so describing himself."

Hastings, Q.C., and *Hadley*, for the Defendants, the directors:—

The libels in the *Broad Arrow* were charges brought against the directors in their capacity of directors, and not in their private capacity; and they tended to damage the credit of the company, and to prejudice the directors in the conduct of the company's business. It was therefore perfectly competent for the directors to defray the expenses of the legal proceedings against the proprietors of the newspaper out of the funds of the company. The memorandum of association provides for the doing of "all such . . . things as are incidental or conducive to the attainment of the objects" of the company, and the institution of these proceedings was conducive to the general objects of the

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company: *Simpson* v. *Westminster Palace Hotel Company* (1); *Taunton* v. *Royal Insurance Company* (2); *Joint Stock Discount Company* v *Brown* (3).

In *Kernaghan* v. *Williams* (4) and *Pickering* v. *Stephenson* (5) the litigation was between shareholders, here, both with regard to the *Broad Arrow* and *Barge*, though nominally by the directors, it was in reality between the company and an outsider. Moreover, the decision in *Pickering* v. *Stephenson* went solely upon the ground that the proceedings in that case, though taken with the consent of the majority of the shareholders, were in fact taken for the purpose of coercing the minority. With regard to *Barge*, his conduct was a manifest obstruction, and calculated seriously to injure the business of the society, and the proceedings against him were with the *bonâ fide* purpose of protecting the society and its business, and so were conducive to its objects.

As to the proxies, the practice adopted by the directors is usual with prosperous companies of high standing, and though for convenience the names of the proxies suggested by the directors are inserted therein, this is no detriment to the shareholders, who can, if they please, erase those names and substitute others.

Cecil Russell, for the representatives of a deceased director:—

All the payments complained of were made *bonâ fide* by the directors. It has not been shewn that they knew they were doing anything illegal, and the Court should not order any repayment by them or their estates.

Colquhoun, in reply.

1886. July 14. KAY, J.:—

This action is brought by a shareholder on behalf of himself and all other shareholders in the *Army and Navy Co-operative Society, Limited*, against the company and some of the directors seeking to restrain them from making certain payments out of the funds of the company, and to recover moneys alleged to have been improperly so paid. There is no case of corrupt dealing

(1) 8 H. L. C. 712.
(2) 2 H. & M. 135.
(3) Law Rep. 3 Eq. 139.
(4) Ibid. 6 Eq. 228.
(5) Law Rep. 14 Eq. 322.

made against the directors, and if the payments could be authorized by a general meeting of the company, the matter would be entirely within the decision of *Foss* v. *Harbottle* (1), and the Court must decline to interfere. But the allegation is that the payments in question could not be so sanctioned, and are altogether *ultrà vires*.

These payments are of two kinds: the first are for the costs of certain criminal proceedings for libel instituted by the directors as prosecutors, and not in the name of the company. The other class of payments relate to proxies issued by the directors to be used at the general meetings of the company.

As to the first class the facts are shortly these:—[His Lordship then stated the facts of the case as to the prosecution of the proprietors of the *Broad Arrow* and of *Barge*, and continued:—] It is argued that the payment of these costs was a misapplication of the funds of the company which a general meeting could not sanction, and certain authorities are referred to in support of that contention. The first of these is *Kernaghan* v. *Williams* (2), where an injunction was granted to restrain a railway company and its directors from using the funds of the company to pay the costs of a suit, instituted by some shareholders, on behalf of themselves and all others except the defendants, against the company and the directors and others, to recover moneys alleged to have been misapplied. The directors whose conduct was impeached had been removed, and three of the plaintiffs in the suit had been appointed directors, and they had obtained the authority of a resolution of a general meeting to prosecute the suit for the benefit and at the expense and risk of the company, as from the commencement thereof. This was followed in the case of *Pickering* v. *Stephenson* (3), where the litigation, the costs of which it was sought to pay, was a criminal proceeding for libel against a certain person who had written letters strongly condemnatory of the board of directors as such, for their management of the affairs of the company; and which also contained statements alleged to be libellous upon them. In his judgment (4), *Wickens*, V.C., said, "It seems to me that where a *quasi* partner-

(1) 2 Hare, 461.
(2) Law Rep. 6 Eq. 228.
(3) Law Rep. 14 Eq. 322.
(4) Ibid. 340.

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ship of this sort is divided into a majority and minority who differ on a question of internal administration, and litigation results from the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund; and that this is independent of the question whether the majority is overwhelming or a bare majority. Of course any shareholder, or number of shareholders, may deal with the company as a stranger, and litigation arising out of such dealings will none the less be the act of the company as a whole, because it is against a member or members of it. And it may be difficult to say exactly where the line runs in such a case; as, for example, in *Kernaghan* v. *Williams* (1), which was cited in the argument. But the proposition stated above seems to me, nevertheless, to be *primâ facie* true. It is said that in this case the litigation was intended indirectly to benefit, and did actually benefit, the company as a company seeking to attain its proper and legitimate objects. That could probably be said with almost equal truth wherever the object and effect of the litigation is to silence the minority and leave the majority supreme. In this case the indictment was avowedly intended to prevent the minority from objecting to the course taken by the general council (supported by a majority) in dealing with the company's funds; or, in other words, to preclude the action of the minority as dissentients. Had that action been confined to what may be called constitutional opposition, and had the attempt been to silence that, the question whether the costs of a litigation with such an object could be paid out of the general funds of the association would not have been arguable; and I think that the form of opposition, whether by appeal to the public, or to the Turkish Government, or to the English Government as having influence on the Turkish Government, affords no satisfactory ground of distinction. The question which was right and which was wrong on the point at issue, or even that of the propriety of the particular mode of raising it, or of that adopted for stopping the discussion, seems to me immaterial. I hold, therefore, that the plaintiff is substantially right in his contention, that the payment of these costs is *ultrà vires* of the majority."

(1) Law Rep. 6 Eq. 228.

In both these cases the proceedings the costs of which were in question were proceedings by some of the shareholders against others, and Vice-Chancellor *Wickens*, as appears from the words I have quoted from his judgment, relies mainly upon this circumstance, his view being that in such a contest to use the funds of the company to assist one side against the other, would be manifestly *ultrà vires*. He distinguishes the case where litigation arises out of dealings between the company and a shareholder not in his character of shareholder. But in such cases the litigation would probably be in the name of the company itself as plaintiffs or defendants. However I do not gather from either of these decisions that when the litigation is not between shareholders but is against a stranger, with the object of preventing him from continuing a course of conduct damaging to the company, that the company are precluded from paying the expenses of such litigation, should it be prosecuted in the name of the directors, and not in that of the company.

In the prosecution of *Barge* I am satisfied that the directors were acting entirely in the interest of the society. His conduct was calculated greatly to injure the company. The directors personally might have treated it with contempt. They were advised by the magistrate to adopt the course of prosecuting him for libelling the directors, as the most effectual mode of putting a stop to his outrageous conduct; and I have no doubt that it was the best course to take in the interest of the society. I cannot hold that the payment of these costs was *ultrà vires*.

I have considerably more difficulty on the question of the costs of the prosecution of the publishers of the *Broad Arrow*. There also the defendants were strangers to the society, and the publication was calculated indirectly to injure the society itself; it was not however, as in *Barge's* case, a direct libel on the society; but a charge of corrupt dealing against the directors. It was a matter seriously affecting their private characters, and only incidentally injuring the company, because some persons might be deterred from becoming customers if they believed the gross charges made against the honesty of the directors. The object of this prosecution was mainly to clear the directors from an

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infamous charge, and my opinion is that these costs ought not to have been paid out of the funds of the society.

The payment was made, and known to the general meeting in 1882 to have been made, before this action was commenced. There is no case for an injunction; and I must follow the decision in *Pickering* v. *Stephenson* (1) by declining to order any repayment of these costs.

Reliance was placed during the argument upon the concluding words of the third clause of the memorandum of association of this company, by which, after describing their business as that of general dealers for the purpose of supplying the shareholders, subscribers, and their friends with articles of domestic consumption and general use, and giving them certain special powers, it was provided: That the society might do all such other things as are "incidental or conducive to the attainment of the above objects or any of them." Similar words were treated in *Simpson* v. *Westminster Palace Hotel Company* (2) as justifying a temporary lease of a portion of the hotel to the *India* Board. And in *Taunton* v. *Royal Insurance Company* (3), under like words, it was held that an insurance company were not acting *ultrà vires* in paying losses which they were not legally liable to pay, but which similar offices were accustomed to pay gratuitously. The same words were held to be material in *Joint Stock Discount Company* v. *Brown* (4).

In the absence of this authority I should have been inclined to suppose that such words could hardly be treated as enlarging the scope of the company's operations, but must rather be considered as *expressio eorum quæ tacite insunt.* But where a question of doubt has arisen it cannot be denied that the Court has relied on such words, and given to the company the benefit of them. They do not in this case alter the conclusion to which I have come. I may treat them as supporting my view as to the costs in *Barge's* case.

The other question arises upon a different state of facts. [His Lordship then stated the facts as to the issue of and payment for the proxy papers, and continued:—]

(1) Law Rep. 14 Eq. 322.
(2) 8 H. L. C. 712.
(3) 2 H. & M. 135.
(4) Law Rep. 3 Eq. 139; Ibid. 8 Eq. 381.

It is obvious that such a course of proceeding would practically give the directors power to determine in such manner as they might think fit any question that might arise at such meeting. Occasionally, it is said, the proxy papers were altered by the insertion by the shareholder of a different name, but the average attendance at the meetings was only about 150 members, and no doubt the majority of the proxies filled up would appoint the directors named in them, and would be sufficient in number to determine any disputed question that might arise.

Now I express without any hesitation my opinion that this is an improper mode of proceeding. The directors have no right to employ the funds of the company to get into their own hands the majority of the voting power. It is said that this is sanctioned by the proceedings of other companies. The attempt to prove this has completely broken down; but everyone familiar with the proceedings of public companies must know from his own observation that it is too often done; and I do not think it is a proceeding which any existing custom can sanction.

If the question were put broadly, Is it *intrà vires* to use the funds of the company to induce shareholders to appoint the directors their proxies? I conceive that no one could hesitate to answer that question in the negative. It may seem to be a very small thing in the case of each individual shareholder, but the sending out of 10,000 or 15,000 such circulars requires a substantial sum of money. The stamps on 15,000 proxies, with the halfpenny return stamp, amount to £93 15*s.*, and the question involved seems to me much more important than the mere money consideration. Such a proceeding as that, I do not hesitate to say, is a misapplication of the funds beyond the power of a general meeting to sanction.

I have not to deal with the case of proxies sent out with a blank to be filled up by the shareholder with the name of the person who is to use them; but even in that case I do not think it would be right to pay the stamp on the proxy or the postage stamp for the return of it out of the company's funds.

It is obvious that a shareholder who votes by proxy does so for his own convenience solely, and the directors have no more right to expend the funds of the company to promote the convenience

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in this respect of a shareholder, who may be too indolent to attend the meeting, than they would in providing him with post-horses or a special train to enable him to attend.

The question has been raised and argued, and I desire to express my opinion explicitly upon it. I think that the funds of the company ought not to be used for printing or sending out such proxy papers as have been used in this case, or for stamping or paying the return postage on proxy papers of any kind.

But it seems to me to be within the powers of this company to print and send out proper forms of proxy papers, by which I mean such as would not tend in any way to influence the votes of the shareholders receiving them.

I must, therefore, grant a perpetual injunction restraining the company and the directors from using the funds or property of the company in paying for the stamps or return postage stamps upon any proxy papers, or in paying for the printing, or sending out any proxy papers with the names of the proposed proxies therein, or otherwise calculated to obtain for the directors or to influence in any manner the votes of the shareholders in the society.

I do not think I ought to direct any repayment of moneys which have been expended in this way.

The judgment must be without costs.

Solicitors: *H. Morris; Tyrrell Lewis, & Co.; Davidson, Burch, & Co.*

W. W. K.

KAY, J.
1886
Aug. 7.

In re STONE.

[1886 S. 1665.]

Loan on Bond to a Trader—Lender receiving Share of Profits nominally as Salary—Substitution of New Agreement—Partnership Law Amendment (Bovill's) Act (28 & 29 *Vict. c.* 86), *ss.* 1, 2, 5 [*Revised Ed. Statutes, vol. xiv., p.* 1142].

In September, 1882, a loan was made to a trader on his bond, the agreement in writing being that the lender should receive interest at £5 per cent. and one-half of the profits of the business of the trader for three years; be instructed in the business; and at the end of that time the lender had an option to be admitted a partner. In October, 1883, the agreement of 1882 was cancelled, and another entered into that the lender should receive £20 a month as interest on the loan in lieu of the former interest and share of profits. The borrower became insolvent in 1886, and executed a deed of trust for the benefit of his creditors:—

Held, that the claim of the lender came within the provisions of sects. 1 and 5 of the *Partnership Law Amendment (Bovill's) Act*, 28 & 29 Vict. c. 86, and must be postponed until the debts of the other creditors had been satisfied.

Adjourned Summons.

By an agreement dated the 1st of September, 1882, *Edward Upward* agreed to lend to *C. F. B. Stone*, who carried on the business of a tea merchant, the sum of £3000, to bear interest at £5 per cent., and for which sum *Stone* was to give *Upward* his bond. *Stone* was also to take *Upward* into his office as clerk or pupil, and to instruct him in the business for three years. During the three years *Stone* was to pay to *Upward* by way of salary a sum equal to one-half of the net profits of the business, in addition to the interest at £5 per cent.; but the relationship established by the agreement was not to be construed as a partnership unless *Upward* should give *Stone* a written notice of his desire to be taken into partnership at the end of the three years, in which case he was to become a partner upon terms expressed in a schedule to the agreement. By a memorandum dated the 27th of October, 1883, the agreement of the 1st of September, 1882, was, by the mutual consent of the parties to it, cancelled, and by another memorandum of even date it was agreed between

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Upward and *Stone* that interest should be paid by *Stone* and received by *Upward* upon the sum of £3000, at a rate equal to £20 a month, and that sum was to be in full discharge of all claims for interest and profits theretofore payable in respect of the £3000.

Stone afterwards became insolvent, and on the 19th of January, 1886, executed a deed of trust for the benefit of his creditors, by which he appointed trustees to get in his estate and effects upon trust to distribute the same among his creditors. It appeared that all the debts due from *Stone* at the date of that deed had been incurred since the 27th of October, 1883, excepting the £3000 owing to *Upward*. The amount realized under the deed of January, 1886, was insufficient to pay the debts of *Stone* in full without reckoning the £3000 claimed by *Upward*. An originating summons was taken out by the trustees of the deed of January, 1886, under Rules of Supreme Court, 1883, Order LV., rule 3 (*a* and *g*), for the determination of the question whether *Upward* was entitled to rank *pari passu* with the general body of *Stone's* creditors; or whether, having regard to the provisions of the statute passed in 1865 to amend the law of partnership (28 & 29 Vict. c. 86), his debt must be postponed.

Joseph F. B. Firth, for the trustees under the deed of 1886:—

This was an advance of money by *Upward* by way of loan to *Stone*, a person engaged in trade, and the case comes within the 28 & 29 Vict. c. 86, commonly known as *Bovill's Act*, the 1st section of which enacts that "the advance of money by way of loan to a person engaged . . . . in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person . . . . carrying on such trade or undertaking, or render him responsible as such," and sect. 5 enacts that "in the event of any such trader as aforesaid being adjudged a bankrupt . . . . or entering into an arrangement to pay his creditors less than 20*s.* in the pound . . . . , the lender of any such loan as aforesaid shall not be entitled to recover any portion of his prin-

cipal, or of the profits or interest payable in respect of such loan . . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied :" *Ex parte Mills* (1). The cancellation of the agreement does not take the case out of the Act.

Renshaw for the creditor :—

The provisions of the 5th section do not apply to this case, but those of the 2nd section, which enact that "no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner" do. The share of profits was to be paid to *Upward* solely by way of salary for his services, and, therefore, the provisions of the statute do not apply ; but assuming that they do, then it is submitted that the effect of the transaction in October, 1883, was such that it really operated as a new agreement. It was equivalent to a payment of the money, and a relending of the sum by *Upward* upon new terms. [He cited the case of *Page* v. *Cowasjee Eduljee* (2), and *Ex parte Taylor* (3) was also referred to during the argument].

KAY, J. :—

The first question is, whether this case comes within the provisions of the statute (28 & 29 Vict. c. 86), and I think it does. [His Lordship read the 1st section, and continued :—] What was done was this : *Stone*, who seems to have been a tea merchant, entered into an agreement with *Upward*, that *Upward* should lend to him the sum of £3000, for which he was to give *Upward* his bond, and pay him interest after the rate of £5 per cent., and *Stone* was to take *Upward* into his office as a clerk or pupil ; instruct him in his business, and pay him, by way of salary, a sum equal to one half of the profits. Then another agreement was made in October, 1883, about a year afterwards, and it operated to put an end to the former agreement of September, 1882. It was

(1) Law Rep. 8 Ch. 569. (2) Law Rep. 1 P. C. 127.
(3) 12 Ch. D. 366.

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contended that the 2nd section of the statute governs the case, because the contract was one really providing for the remuneration of *Upward* for his services. [His Lordship read the 2nd section, and continued:—] That section provides that no contract for the remuneration of a servant or agent of a person engaged in trade shall of itself render such servant or agent responsible as a partner, nor give him the rights of a partner; but this is a case where it is quite plain upon the face of the agreement that *Upward* would never have lent his money upon the personal bond of *Stone* to secure the repayment of the sum and interest at £5 per cent., but for the rest of the contract, viz., that *Upward* should receive one half of the profits of the business. On the other hand, the lending of the money was the consideration on *Stone's* part for taking *Upward* into his employment as clerk or pupil, and giving him one half of the profits for his services in the business. The whole transaction was one contract, and comes plainly within the terms of the 1st section of the statute, of an advance of money by way of loan to a person engaged in trade, and under a contract in writing with such person that the lender should receive a share of the profits. I am of opinion that the case comes within the letter of the section and the spirit of the section. It is quite obvious that it was part of the contract that the loan should be made for a share of the profits in addition to interest after the rate of £5 per cent. I think that the 2nd section of the statute does not apply, but that the 1st and 5th sections do apply.

Then it was contended that the agreement entered into in October, 1883, put an end to the agreement of September, 1882, and that the contract to pay interest after the rate of £20 a month was equivalent to payment of the sum, and a new lending of it; but as to that transaction, the case is governed by the decision in *Ex parte Mills* (1), where it was held that the time at which the advance was made must be looked at, and if that advance was made upon a contract under which the lender was to receive a share of the profits, that brings it within the provisions of the statute. The fact that the first agreement of September, 1882, was afterwards altered by another agreement

(1) Law Rep. 8 Ch. 569.

in October, 1883, which may have been secret, and not known to the world, cannot affect creditors who claim under a deed of trust subsequently executed. As it has not been plainly shewn that what took place in October, 1883, amounted to an entirely new loan by *Upward*, the case has not been taken out of the letter of the statute, and I hold that the claim is within the mischief which the statute was intended to provide against. Therefore the declaration must be that *Upward's* claim to prove must be postponed until the claims of the other creditors have been satisfied. The costs of the trustees must come out of the estate.

Solicitors: *Duffield & Bruty; Crowdy, Son, & Tarry.*

T. F. M.

CHITTY, J.

1886

May 28; *June* 1.

SCHOVE *v.* SCHMINCKÉ.

[1886 S. 1186.]

Copyright—Trade Name—"Castle Album"—5 & 6 Vict. c. 45 [*Revised Ed. Statutes, vol. viii., p.* 1152].

An album for holding photographs, with pictorial borders containing views of castles with short descriptions attached, is not a "book" within 5 & 6 Vict. c. 45, s. 1, so as to be capable of obtaining copyright for the contents.

An album thus illustrated was entitled by the Plaintiff, who claimed to have been the first inventor, the "*Castle Album*," and had been sold by him under that name since 1883, when the work was registered by him under 5 & 6 Vict. c. 45, and the illustrations under the *Fine Arts Copyright Act* (25 & 26 Vict. c. 68):—

Held, that, as the Plaintiff could not by registration obtain copyright for the mere name "*Castle Album*," he had not in the absence of distinct evidence that such name had become generally accepted in the market as exclusively denoting the Plaintiff's album, acquired any exclusive right to the name as a trade name so as to be able to restrain the use of it by others to describe their albums similarly illustrated, but not shewn to be pirated from that of the Plaintiff.

MOTION to restrain an alleged infringement of Plaintiff's copyright in the "*Castle Album*."

In June, 1883, the Plaintiff invented and published an album for holding photographs, which contained the words "*Castle Album*," in the frontispiece, and was ornamented with seven views, headed by *Windsor Castle*, of castles in the *United Kingdom*, with a few lines of description appended to each view.

On the 10th of July, 1883, the Plaintiff caused his album, under the title "*Castle Album*," to be registered under 5 & 6 Vict. c. 45, and also each of the illustrations to be registered under the *Fine Arts Copyright Act* (25 & 26 Vict. c. 68).

The Defendant was agent in this country for the firm of *Löwenstein & Hecht*, factors and commission merchants at *Berlin* for fancy goods. Towards the end of 1885 he received from them as a sample a photographic album with pictures of English castles. At the request of a Mr. *Haynes* (of the firm of *Eyre & Spottiswoode*) the Defendant supplied him with this sample

album, which was alleged by Plaintiff to be an infringement of his copyright.

The album thus supplied by the Defendant had the words "*The Castle Album*" in the frontispiece, and ten views of castles and abbeys, all in *England*, including *Windsor Castle*, which was the only one common to the two productions.

Evidence was adduced on behalf of the Plaintiff for the purpose of shewing that the idea of embellishing a photographic album with pictures of castles was first invented by him in June, 1883, and that before that date no album thus illustrated, or bearing the title "*Castle Album*," had been known in the trade; that the Plaintiff's album was well known in the trade, and always sold and invoiced as the "*Castle Album*," under which title customers would ask for it, and that to offer for sale any other photographic album under the title "*Castle Album*," would mislead the public, and cause them to buy the last-mentioned instead of the original and well-established "*Castle Album*" invented and sold by Plaintiff, and recognised in the trade as belonging to him. On the other hand, evidence was given on behalf of Defendant to the effect that illustrations of castles were not new in photographic albums, but had been in common use for many years; that these illustrated albums were not generally known in the trade by any distinctive title, but were bought and sold under specific numbers given to them by the different makers or dealers, and that the title "*Castle Album*," which was merely descriptive of the contents, would not distinguish the productions of the Plaintiff from those of any other firm. It was also alleged that there were material differences in the Plaintiff's and Defendant's albums as to contents, colour, and description of paper, printing, binding, and general get-up.

Romer, Q.C., and *John Cutler*, in support of the motion:—

The Defendant's album is plainly an imitation of that of the Plaintiff, and compiled with knowledge of its contents. We do not claim any copyright in the idea of ornamenting a photographic album with floral or pictorial borders, but we have proved that the title "*Castle Album*," which Plaintiff has registered, has been identified with his goods, not only in *London* but elsewhere,

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and that this title is recognised as one exclusively used by Plaintiff to denote his goods. Infringement of the title of a work will be restrained by injunction: *Mack* v. *Petter* (1).

[CHITTY, J.—Do you call your album a book?]

It is not the less a book because it is something more than a book in containing engravings with letterpress bound up in the form of a book. The term "literary work" includes the preparation of maps, charts, and plans, and if so, would cover the preparation of a book upon which industry has been bestowed in collecting views of the old castles of *England*, and giving short descriptions of each.

[They also referred to *Davis* v. *Comitti* (2).]

Aston, Q.C., and *D. L. Alexander*, for the Defendant:—

There is no infringement where the alleged infringement is confined to taking a common title in which there can be no copyright: *Dicks* v. *Yates* (3).

It is not pretended that the Plaintiff's list of castles has been taken by the Defendant, or that the Plaintiff's engravings are original. Then is it a book within the meaning of the Act? What is an "album?" A blank book.

[CHITTY, J.:—It comes to be something more than that when filled up.]

Yes, when the album by containing autographs or original effusions ceases to be a mere collection of blank pages. But this photographic album has no literary character whatever, being only an ornamented article of commerce, a collection of picture frames with illustrated borders bound up together. It might be registered as a design and obtain five years' protection, but it cannot be entitled to copyright for forty-two years. No one can claim the exclusive right of ornamenting a photographic album with pictures of castles, and of calling it by the only name which will describe its contents.

[CHITTY, J.:—Take the case of a newspaper title, such as the *Daily News*.]

(1) Law Rep. 14 Eq. 431. (2) 54 L. J. (Ch.) 419; 52 L. T. (N.S.) 539.
(3) 18 Ch. D. 76.

The title of a newspaper will be protected as being the name which is well known and recognised by all the world as that under which a paper, which certain persons only have the exclusive right of publishing, is sold. The title "*Castle Album*" in no way denotes that the Plaintiff has made the particular album, but is only descriptive of its contents. It will not be contended that the Plaintiff is the only person entitled to ornament a photographic album with pictures of castles. The Defendant may do so also, and describe as a "*Castle Album*" the album thus decorated, there being no other words which would aptly describe the contents, and, consequently, no exclusive right in the Plaintiff to words which are merely descriptive.

Romer, in reply:—

The title "*Castle Album*," which upon the evidence has been recognised in the trade as invented and exclusively used by the Plaintiff, is used and was first adopted by him to denote the particular photographic album, which he was the first to ornament with pictures of castles, and not as a merely descriptive title.

Such a term as "*Acorn Soap*" will be protected; not because the soap is made out of acorns, but because the maker has been the first to stamp his soap with an acorn and to sell soap so stamped under that title. On the same principle the infringement of the trade name "*Genuine Yankee Soap*" has been restrained: *Williams* v. *Spence* (1). So also if the Plaintiff were the first to ornament the sides of his album with chess-board squares and adopt for it that name, it would be descriptive of his album, identified with his album, and the name could not be taken by any one else.

CHITTY, J., suggested that the Defendant should keep an account until the trial, but the Defendant declined to do so, and asked the Court to give judgment.

1886. June 1. CHITTY, J.:—

The argument for the Plaintiff is based on two distinct grounds: first, on copyright under 5 & 6 Vict. c. 45. The Plaintiff's album is a book in form, but in form only. It is not

(1) Seb. Dig. 83, 131.

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a book within the scope of the preamble of that statute, which speaks of "literary works," nor a book within sect. 1, which contains an interpretation of the term as used in the statute. The only letterpress which it contains consists of the title "*Castle Album*," a list of the castles represented by coloured drawings, and a short description of the castles themselves, not covering more than a portion of a page. In substance the Plaintiff's album is an ornamental article of commerce, consisting of a collection of open spaces or frames for the insertion of photographic pictures with pictures of castles bound up together in the form of a book. But even if it were a book within the statute there is no infringement of the copyright. The Defendant has neither taken, nor imitated any part of the Plaintiff's album beyond the title "*Castle Album*," and it is clear that the mere taking of a title consisting simply of two ordinary words of the English language would not be an infringement of copyright. So far as I am concerned, my decision on this point is final.

The second ground is that of trade name. It is not a name under which the Plaintiff trades, but it is alleged that the term "*Castle Album*" has come to be used in the market, in a secondary sense, to denote exclusively an album of the Plaintiff's manufacture or choice: in effect the Plaintiff seeks to bring his case within the principle of *Wotherspoon* v. *Currie* (*Glenfield Starch Case*) (1). He has been selling this album under the description of "*Castle Album*" since 1883, and has sold a great number of copies, some 7000 or so; and on the evidence as it stands it appears that no other person had sold albums under that name until the Defendant recently began to sell his. But these facts by themselves are not sufficient to establish the Plaintiff's case. There is evidence given by persons conversant with the trade to the effect that the term "*Castle Album*" is now understood in the trade to represent the Plaintiff's goods. But several of the Plaintiff's witnesses are silent on this subject, and others who have made affidavits do not say more than that the term "*Castle Album*" denotes the Plaintiff's albums and no others. This may mean that the term denotes the Plaintiff's goods to the witnesses themselves, which is very probable, and may be accepted as true; seeing that

(1) Law Rep. 5 H. L. 508.

they are customers of the Plaintiff and have received from him all the "*Castle Albums*" they have bought. Thus in their minds the term would naturally be associated with the Plaintiff and goods of his manufacture or selection. But statements to this effect fall far short of the proposition which the Plaintiff seeks to establish, viz., that the term is now accepted in the market generally as designating exclusively his goods. Opposed to the evidence of the Plaintiff's witnesses is the evidence of a considerable body of respectable witnesses also conversant with the trade. Further, the Plaintiff has been selling other albums of a similar character, but under different designations, such as "*The Lake Album*," "*The Old Saxon*," and "*The Marble*." And others, dealers in or manufacturers of similar articles, have been selling them under the designations of "*Floral Albums*," "*Old London*," "*The Thames*," and other titles. All these albums are apparently similar to the album in question, differing only or mainly in the pictures they contain; and the titles appear to be taken from the pictures, and to be descriptive of them. It is urged for the Plaintiff that these terms are not descriptive of an album for photographs. They are not exhaustively descriptive; few descriptions are. But they are descriptive so far as they go, and serve to denote the difference between different sorts of albums of the same class. It is obvious that any person is at liberty to make and sell an album with representations of castles, and it is a strong proposition to say that he is not at liberty to describe it as a *Castle Album* or "*The Castle Album*." Assuming that in point of law it is competent for the Plaintiff to claim an exclusive right to this title or term, he can only do so by establishing incontrovertibly the proposition that the term has by general user come to be used in a secondary sense as an equivalent for and to denote exclusively his own goods; and much more cogent evidence would be required than he has adduced in support of the motion.

On the balance of the evidence as it stands, and on the question of probable success or failure at the trial, I refuse to grant the injunction. But I make the costs costs in the action.

Solicitors: *McKenna & Co.; Herbert Bentwitch.*

F. G. A. W.

CHITTY, J.
1886
June 1.

In re HULKES.
POWELL *v.* HULKES.

[1881 P. 3646.]

Administration—Executor—Payments made in Mistake of Law or Mistake of Facts—Liability to refund with Interest—Acquiescence.

The decision in *Saltmarsh* v. *Barrett* (1), that executors who, acting *bonâ fide*, have distributed the assets upon what turns out to be an erroneous construction of the will, are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, dissented from as departing from the principle established in *Attorney-General* v. *Köhler* (2) and *Attorney-General* v. *Alford* (3).

But although as a general rule executors are liable to be charged with interest at 4 per cent. on sums improperly paid or improperly retained by them, they are not liable for interest to the legatee (or his representatives) to whom, with full knowledge on his part and in common mistake, the payments which he must refund have thus been erroneously made.

FURTHER CONSIDERATION.

By will, dated in 1871, *Anne Maria Hulkes*, who died in February, 1879, appointed the Plaintiffs, *S. Powell* and *T. B. Langley*, her executors, and directed them out of the shares of personal estate, thereinafter first directed to be sold and converted into money, to pay all her just debts, funeral and testamentary expenses, and, at the expiration of six calendar months after her death, to pay certain specific pecuniary and charitable legacies. And in order that the same and all her just debts might be paid within six calendar months after her death, testatrix directed her executors to sell and convert into money certain stocks and shares which were named in the will, and also all other her shares and personal estate and money in the bank not therein specifically mentioned and bequeathed. After payment of the before-mentioned legacies and the duty thereon, and all her just debts and funeral and testamentary expenses as aforesaid, the executors were directed to pay the net residue to her brother, the Defendant, *H. S. Hulkes*, his executors or administrators. And as to all the residue of her real and personal estate (consisting of

(1) 31 Beav. 349. (2) 9 H. L. C. 654.
(3) 4 D. M. & G. 843.

certain lands, stocks, and shares mentioned in the will), and all other her estate and effects whatsoever and wheresoever not thereinbefore specifically bequeathed, testatrix bequeathed the same unto her executors upon trust to receive the rents, issues, and profits, and pay the same, after deducting reasonable expenses, to *H. S. Hulkes* for life, and after his death to sell and dispose of all the net residue and remainder of her real and personal estate, and to pay thereout the several legacies in her will mentioned (including several legacies to charitable institutions), such legacies to be paid free of duty within six months after her brother's death, and to be raised and paid out of her money, goods, and personal estate and effects which she might or could by law charge with the payment of the same. Legacies were given to the executors, and after payment of all the aforesaid legacies and sums of money and all expenses attending the payment thereof, and the carrying out the trusts of her will, testatrix directed her executors to divide the net residue of her personal estate and effects, whatsoever and wheresoever, equally between and amongst certain charities and societies. And as to all her pictures, plate, linen, china, household goods, and furniture, chattels, and personal effects which she had not sold or disposed of in her lifetime, in case she should not dispose of the same, or any part thereof, by any codicil to her will, the trustees and executors were directed to sell and dispose of the same as they might deem proper, the proceeds to form part of her residuary personal estate divisible among the before mentioned charities or societies.

Shortly after the death of testatrix the executors sold the plate, household goods, and furniture and other effects, and applied the proceeds in part payment of the legacies, paying over the balance to the Defendant *Hulkes*.

The construction of the will adopted by the executors, viz., that the proceeds arising from the sale of the furniture and personal effects formed part of the special fund provided for payment of the particular legacies, was decided by his Lordship to be erroneous.

At the death of testatrix the Defendant *H. S. Hulkes* was living in *Australia*, and the executors were in constant communication with him, sending him a copy of the will and the accounts from

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time to time, with explanations, calling his attention in the correspondence to the fact that they were accounting to him for the balance of the furniture money.

In 1881 this action was brought by the executors against *H. S. Hulkes* for administration of the estate; and in the action *Hulkes* counter-claimed for a declaration that the proceeds of sale of the plate, furniture, and other effects ought not to have been applied in part payment of the legacies, but ought to have been invested, and the income paid to the Defendant as part income of the property to which he was entitled for life under the trusts of the will, and that the Plaintiffs ought to be charged with interest on the proceeds. As above stated, this construction of the will had been adopted by the Court.

The Defendant *Hulkes* died before the action came on for hearing on further consideration.

Ince, Q.C., and *Charles Browne*, for the Plaintiffs:—

Executors who have paid away or retained money upon a *bonâ fide* mistake as to the construction of an obscure will, or under a fair misapprehension as to the rights of the parties, will not be charged with interest on the sums so paid away or retained: *Saltmarsh* v. *Barrett* (1); *Bruere* v. *Pemberton* (2); *Lowson* v. *Copeland* (3). The principles on which an executor or trustee, who has retained in his hands, uninvested, funds which he ought to have invested, will be charged with interest and the rate of such interest are discussed in *Attorney-General* v. *Alford* (4), but do not apply to a case like this, where the payment was made *bonâ fide* upon a construction of the will which, though afterwards decided to be erroneous, had been assented to by the Defendant, in whose behalf the claim for interest is now set up. [*Tebbs* v. *Carpenter* (5) was also referred to.]

Romer, Q.C., and *Job Bradford*, for the representatives of *H. S. Hulkes*:—

Assuming that the will was obscure, it was the duty of the

(1) 31 Beav. 349.
(2) 12 Ves. 386.
(3) 2 Bro. C. C. 156.
(4) 4 D. M. & G. 843, 850.
(5) 1 Madd. 290.

executors to have obtained the opinion of the Court before making the payments in question. If liable for repayment of principal sums wrongly paid or retained, they are equally responsible for the interest; and that this rule is of universal application is shewn by the fact that interest at 4 per cent. is payable in respect of money retained by the Crown as administrator: *Attorney-General* v. *Köhler* (1). *In re Gosman* (2) was also referred to on this point. All the authorities with the exception of *Saltmarsh* v. *Barrett* (3), which is only reported *ex relatione*, support this view, and it is submitted that the Court will not, in disregard of the current of authorities, follow that case.

Ingle Joyce, *E. W. Byrne*, and *Mulligan*, appeared for other parties interested.

Ince, in reply:—

On what principle can executors who have made the erroneous payments with full knowledge and concurrence on the part of the person on whose behalf this claim is made be liable to him for interest? The general proposition to be derived from Lord *Cranworth's* judgment in *Attorney-General* v. *Köhler* is that the Court does not make trustees or executors pay interest by way of punishment. Full knowledge of all that was done in the administration was from time to time communicated to *H. S. Hulkes*, and the liability for interest ought not to fall upon the executors who had no interest in the matter rather than upon the Defendant who has received the benefit of the wrongful payment. In any case, after his acquiescence with full knowledge he is not entitled to receive interest: *Lewin* on Trusts (4).

CHITTY, J.:—

A general question has been argued with regard to the liability of trustees to pay interest, and I will state my view of the law founded on what I consider to be authorities binding on me. In *Attorney-General* v. *Alford* (5) Lord *Cranworth* had the question

(1) 9 H. L. C. 654, 680.
(2) 15 Ch. D. 67; 17 Ch. D. 771.
(3) 31 Beav. 349.
(4) Page 786.
(5) 4 D. M. & G. 843.

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before him and examined the principle, upon which part of the reasoning as to the liability of a trustee to pay interest was founded, at some considerable length, and in stating his own opinion he said (1): "What the Court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made, than one of those I have mentioned." He is there dealing, I need scarcely say, with the case of an executor or trustee who has received the trust fund in respect of which the demand for interest is made, and he is not dealing with the case of wilful default. In *Vyse* v. *Foster* (2) Lord Justice *James* referred to Lord *Cranworth's* judgment in *Attorney-General* v. *Alford* (3), and without reading at length the passage, I may state for shortness that he agreed with the principle enunciated by Lord *Cranworth*. Dealing particularly with that doctrine of punishment, he says (4): "In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest." Now the only other authority I will mention is *Attorney-General* v. *Köhler* (5), and there the question was whether an administrator who had wrongly paid over the estate under the intestacy was liable when he had to account to the next of kin for the principal of the estate to pay interest. Those are the only facts necessary to state in order to ascertain the grounds upon which the House of Lords proceeded. The circumstance that that administrator was the nominee of the Crown was altogether immaterial on this point, and Lord *Cranworth* in advising the House of Lords, after, in substance, shewing that the administrator had paid away the money in error, there being no question of fraud, and under a mistake of fact, stated his opinion that the administrator was liable to pay it as a matter of course. He said (6): "I can discover no ground for relieving him

(1) 4 D. M. & G. 851.
(2) Law Rep. 8 Ch. 309.
(3) 4 D. M. & G. 843.
(4) Law Rep. 8 Ch. 333.
(5) 9 H. L. C. 654.
(6) Ibid. 680.

from the payment of interest more than from payment of principal. His liability would have arisen from his having improperly paid over to the Crown money belonging to the next of kin." He does not mean that there was any sinister intent, but that the payment had been made in a mistaken view of the law, or more probably in a mistaken view of the facts. "Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principal is clear." The other members of the House who advised the House in their speeches came to the same conclusion, and the judgment of the House of Lords went, not simply for the principal, but for the interest. The circumstance that Lord *Campbell*, who had died before the judgment was given, had formed an adverse opinion is a circumstance, of course, that can have no weight with me. That is the judgment of the House of Lords, and it is founded simply on the ground put by Lord *Cranworth*, that the administrator who has improperly paid away money is deemed by a Court of Equity still to have the money in his own hands. There is a judgment of Lord *Hatherley* in *Middleton* v. *Chichester* (1), a case under the *Debtors Act*, 1869, which strongly illustrates that proposition. The trustee who had been ordered by a Court of Equity to pay any sum in his possession or under his control, was liable to be attached for default of payment, and the question was as to the meaning of the words "any sums in his possession or under his control." In expounding the statute Lord *Hatherley* stated a general proposition of equity upon which he founded himself in order to arrive at the true meaning of those words, and he said (2): "But there is a sensible and intelligible construction to be put upon the clause if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a Court of Equity as having them in his possession until he has properly discharged himself." A payment to a wrong person obviously is no discharge, and I think that there Lord *Hatherley* was stating correctly the view which Courts of Equity, at least in modern times, have always taken. In order to avoid misapprehension I would say that in this case

(1) Law Rep. 6 Ch. 152. (2) Law Rep. 6 Ch. 157.

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there is no question of wilful default. A trustee is liable to be charged, and it is a matter, I am sorry to say, not of very unfrequent occurrence on the further consideration of an administration cause, with interest on balances in his hands. The Court finds in taking the account that he had balances remaining in his hands from time to time. Then he is held liable for interest at 4 per cent., being at the same time at liberty to excuse or justify himself where he shews that the exigencies of the trust required that he should retain the money in question in his hands for the purpose of due administration of the estate.

What I have stated I consider to be the general law on the subject, and the only exception, as far as decision goes, that I know in modern times is the decision in *Saltmarsh* v. *Barrett* (1), where Sir *J. Romilly* held that an executor who paid money under a mistake was not liable, though liable to refund the principal, to pay interest on it. If that had been the true state of the law I should have been very glad to follow it, because I am satisfied that many cases occur in which trustees are somewhat severely treated in a Court of Equity and have been so. But on comparing his decision with the higher authorities that I have already mentioned it appears to me that the decision cannot be maintained. At least it is one on which I cannot venture to act. If a trustee were excused from payment of interest where he acted *bonâ fide*, then according to the decision of Sir *J. Romilly* I should have a difficulty in dealing with that not uncommon case where the trustee in perfect innocence and good faith makes an investment which turns out not to be authorized. He is ordered then to replace the fund, and to replace it with interest from the time the investment was made. I need not go into the details of such a case as that. Of course if the interest made by the fund is equivalent to 4 per cent. no question arises, but a question only arises where, as sometimes happens, the investment turns out wholly unprofitable and produces no income whatever. For these reasons, in stating the general principle of the law, I think I am not at liberty to adopt Sir *J. Romilly's* decision. I now come to the peculiar facts of the case, and to my mind they are very special. The will of the testatrix was obscure, and it took con-

(1) 31 Beav. 349.

siderable argument before me to ascertain what the true construction of it was, and although I have expressed judicially my opinion as to the true construction, I must feel as many others who have had to deal with obscure wills have felt, that there is no dogmatizing on a matter such as this, but that it is open to others to say that the construction I have adopted is not correct. But still I have decided by my judgment that on the true construction of this will the furniture did not form part of the special fund which was devoted to the payment of the testatrix's debts and the immediate legacies, and that the furniture over which the trustee had a power of sale constituted a portion of the estate of which the late Mr. *Hulkes* was tenant for life. The result therefore is, that *Hulkes* was entitled to the interest of the money which arose from the sale after paying the proper expenses of the sale. He was in *Australia* when the testatrix died. The executors, as appears by their acts, adopted what I hold to be an erroneous construction of the will, and selling the furniture, which they did properly, for they had power in any view of the will to sell it, applied a considerable portion of the moneys derived from the sale in paying legacies which, according to the true construction of the will, ought not to have been paid out of that fund; and the balance of that fund—for there was a balance of some few hundred pounds—they paid over to *Hulkes* who was tenant for life, upon the true construction of the will, of this money. They adopted the construction that the furniture formed part of the special fund, and if they had been right in that they would have been right also in handing over to *Hulkes* the balance, because under the terms of the will the balance of that fund, of whatever particulars it really consisted, was his money. They sent him accounts from time to time with letters of explanation, and, on the reading of the accounts in connection with the letters, I am satisfied that they did call his attention to the fact that they were accounting to him for the balance of the furniture money. The result therefore is, that he, being a man of business, as is shewn from his letters, was aware of what the trustees had done after they had done it, and being, as of course I assume in his favour, an honest man, he took the balance of the furniture fund on the only footing on which he could take it, viz., after

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referring to the copy of the will before him and adopting the same construction of the will as the trustees themselves had adopted and acted upon, and that money he kept until this action was instituted.

Now the question is, whether the trustees are liable to account to him as tenant for life for interest at 4 per cent. on so much of the furniture money as they paid away to the charities. I will treat the question, first, as if there was no demand made against Mr. *Hulkes*. How would it then stand? The trustees and the *cestui que trust* both adopted the same construction of the will. I throw in, though I do not consider it a governing circumstance, that they adopt the same construction of a will which is obscure, and the trustees having no doubt by their acts first put forward that construction, Mr. *Hulkes*, the *cestui que trust*, adopts it by his acts also. Then at the end of a certain number of years other persons interested complain and say this is not the right course of administration; you made a blunder, both of you. Thereupon says Mr. *Hulkes* to the trustees, "That is true, but now that the matter is to be set right you must pay interest upon the sum at 4 per cent. which you improperly paid away." I have a case, therefore, not of the *cestui que trust* instigating the trustees to commit what turns out to be a breach of trust, but I have a case of the *cestui que trust* acquiescing for a number of years in the breach of trust, and, if that were the whole of the case, it appears to me the *cestui que trust* could not now turn round on innocent and honest trustees, and say, "you must account to me for the interest." It would be a common mistake, and there would be acquiescence by the *cestui que trust* who had not in the first instance concurred in the act.

It is necessary to bear in mind that that is not the whole of the case, and I have broken this part of the transaction into two in order that I may deal fairly with the facts. Now the other persons who were interested in the estate say that Mr. *Hulkes* must refund that portion of the furniture money which is capital, and which is now applicable to paying their legacies, their legacies being deferred legacies. Well, Mr. *Hulkes* must refund that money. He knew the will. He knew that he was receiving part of the trust fund which belonged to other persons, and he must

refund. He must refund at the instance of the legatees, and he must refund, I think, also at the instance of the executors who are now instructed by the Court that the construction upon which they and Mr. *Hulkes* acted was an erroneous one. Must Mr. *Hulkes* repay the balance he received with interest? No. Why? Because he was tenant for life of the fund, and consequently was entitled to the interest on the portion of the fund which he received.

Then remains the question whether, having regard to this second set of facts I have mentioned, the trustees are placed in a worse position? To put the argument as strongly as I can for Mr. *Hulkes,* he says, "What I have done was to acquiesce in your view of the will, and when any one comes and shews that your view was erroneous and insists upon the matter being put right by my refunding the principal I received, then I insist that everything should be set right, and that you, the trustees, should pay me, as tenant for life, interest on that part of the proceeds which was paid not to me but to other persons instead of being invested." I think that view is not correct. I think the trustees are entitled to say to him, because it is only between him and them that the question of interest arises, "Common error there was, we acted on it and you never complained, and therefore we are still entitled, as between us, to the benefit of your long acquiescence." On that view the trustees are not liable to repay interest to Mr. *Hulkes.*

Solicitors: *Paterson, Snow, Bloxam & Kinder,* agents for *S. C. F. & C. A. Powell, Harrogate; Wild, Browne & Wild; Hopgood, Foster & Dowson; Patey & Warren.*

F. G. A. W.

CHITTY, J.

1886

June 23;
July 6.

ELWES *v.* BRIGG GAS COMPANY.

[1886 E. 589.]

Lessor and Lessee—Prehistoric Chattel found beneath the Surface.

In land demised to a gas company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authorized, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gasholder and other buildings, a prehistoric boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—

Held, that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease.

By lease, dated the 7th of December, 1885, the Plaintiff, *V. D. H. Cary Elwes*, who was lord of the manor of *Brigg*, and tenant for life in possession of the *Elwes* family estates, in exercise of the power limited to him by a settlement of the 5th of April, 1856, appointed and demised unto the *Brigg Gas Company* a piece of land in *Brigg*, forming part of the *Elwes* estates, for a term of ninety-nine years, at a yearly rent of £4 11*s.* 4*d.*, reserving unto the lessor and his assigns, and to the person or persons for the time being entitled under the said settlement to the *Elwes* estates in remainder or reversion expectant on the death of the lessor, "all mines and minerals, and all watercourses which now are or during the term hereby granted shall be upon or under the said piece of land and premises, with liberty to enter thereon respectively from time to time for the purpose of opening, cleansing, and repairing such watercourses." The lease contained a covenant by the lessee company to erect a boundary wall, and that the gas holders, gas tanks, erections, sheds, and buildings of every description which might be erected and set up on the demised premises should be made under the inspection and to the satisfaction of the surveyor or agent for the time being of the lessor, and according to plans and specifications to be previously approved in writing by him; and that

they would erect and set up every such gas holder, &c., with the best bricks, timber, and other materials as should from time to time be approved and sanctioned by such surveyor or agent of the lessor.

And the lessor thereby covenanted with the lessees, their successors and assigns, that on their paying the yearly rent thereby reserved, and observing and performing the covenants by them therein contained, they should hold and enjoy the premises and all buildings to be erected thereon during the term of ninety-nine years without any interruption by the lessor or any person or persons claiming under him or under the settlement, with a proviso that at the expiration or sooner determination of the term thereby granted the lessees or their assigns might take down and remove all trade fixtures, implements, and things in or about the demised premises, but not the boundary wall, erections, sheds, and buildings, all of which would form the property of the lessor, with an option to the lessor to take the trade fixtures at a valuation.

In April, 1886, the Defendant company, in the course of their excavations for the purpose of erecting a gasholder on the demised land, discovered embedded in the clay, some feet below the surface, and within a few yards of the River *Ancholme*, an ancient prehistoric ship or boat about forty-five feet long, and apparently hollowed out of a large oak tree.

On the 1st of May the Plaintiff caused a notice to be served upon the clerk of the Defendant company claiming the boat and requiring it to be delivered up.

The Defendant company declined to comply with the Plaintiff's demand and asserted that the boat belonged to them.

To determine this question the present action was brought.

Romer, Q.C., and *S. Dickinson*, for the Plaintiff:—

In any view of the case—whether regarded as a movable chattel, a chattel affixed to the soil, or something in the nature of a mineral and as such within the reservation clause of the lease—the boat is the property of the Plaintiff (the lessor) and not of the Defendant company (the lessees). If land be demised for life or years the lessee has but a special interest or property

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in the trees, being timber, as things annexed to the land, so long as they are annexed to it; but if the lessee or any other severs them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them as things which were parcel of his inheritance: *Herlakenden's Case* (1). This piece of oak below the surface, which in process of time has become annexed to and part of the freehold, and thereby has ceased to be a chattel, is unquestionably part of the inheritance within the maxim, *Quicquid plantatur solo, solo cedit;* and did not pass by the lease, which merely gives the lessees the right to possession of the land and of the annual profits for ninety-nine years. Can it be said that annual profits would include this prehistoric boat? Amongst goods and chattels annexed to the freehold which go to the heir and not to the executor or administrator, are "roots, &c., within the soil:" *Com.* Dig. *Biens* (B). So also "If a man be hung in chains upon my land; after the body is consumed, I shall have gibbet and chain:" *Spark* v. *Spicer* (2). Assuming the boat to have remained a chattel throughout, the lessor is *primâ facie* the owner, for though he has granted possession of the soil to the Defendant company for ninety-nine years, it could not have been intended to grant any interest in such a thing as this. If I sell a bureau, and money be afterwards found in a secret drawer, the money will belong to me and not to the finder: *Cartwright* v. *Green* (3); *Merry* v. *Green* (4); *Bridges* v. *Hawkesworth* (5). The preferable view of the case, however, is that the boat, which when dug up might have been exhibited or sold for profit, is within the reservation of mines and minerals contained in the lease. "A reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning:" *Hext* v. *Gill* (6); *Tucker* v. *Linger* (7).

[CHITTY, J.:—Coprolites as minerals have been held to be the

(1) 4 Rep. 62 a.
(2) 1 Ld. Raym. 738.
(3) 8 Ves. 405.
(4) 7 M. & W. 623.
(5) 21 L. J. (Q.B.) 75.
(6) Law Rep. 7 Ch. 699, 712 (*per Mellish*, L.J.).
(7) 21 Ch. D. 18, 35, 36.

property of the lord, and not of the copyholder: *Attorney-General* v. *Tomline* (1).]

If the boat had become fossilised, or if the thing discovered had been the skeleton of a megalosaurus, it would clearly have been within the reservation. Why not then when, like bog oak, it has become embedded in the crust of the earth by the process of nature? And if neither a movable chattel, nor a mineral within the reservation contained in the lease, it will equally belong to the lessor as affixed to the soil.

Macnaghten, Q.C. (*Nalder* with him) for the Defendant company:—

We do not dispute the maxims cited, nor the analogy to the bones of a megalosaurus, but they do not apply to this case. If regarded as a tree it is more like a "dotard" without any timber in it, to which, as against the lessor, the lessee would be entitled: *Channon* v. *Patch* (2). Even if the landlord had known of the existence of this boat, he could not after granting the lease and parting with the possession of the land for ninety-nine years have entered upon the land and dug up the boat. The lease is not an agricultural lease, but it contemplates that buildings requiring very deep excavations for the foundations should be erected on the land demised. The tenant is bound at his own expense to get rid of the spoil arising from the excavations, and if he must bear the burden, why should he not get the benefit of making a profit out of the thing excavated? The later decision in the House of Lords of *Tucker* v. *Linger* (3) negatives the view that flints are minerals. And in *Attorney-General for the Isle of Man* v. *Mylchreest* (4), a reservation in an act of settlement of "mines and minerals of what kind soever" was held not to include clay and sand—both of which are substances dug for profit. In this case the reservation of mines and minerals cannot possibly apply to spoil which the lessees are bound to bring to the surface and get rid of according to the intention and meaning of the parties to the lease, which must be looked to. And having regard to that intention as expressed by the covenants, the lessees cannot

(1) 5 Ch. D. 750.
(2) 5 B. & C. 897.
(3) 8 App. Cas. 508.
(4) 4 App. Cas. 294, 307.

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be restrained by the lessor from getting rid, as they think best, of all matters excavated by them pursuant to the conditions of their lease.

S. Dickinson, in reply.

1886. July 6. CHITTY, J.:—

The facts are not in dispute. The boat is very ancient; the parties to the action concur in the statement, more or less conjectural, that it is some two thousand years old, and that having been abandoned or left derelict by its original owners on what is now the bank of the River *Ancholme*, it became by the operation of natural causes, such as by sinking in the ooze and the deposit of alluvial soil, buried in the earth; and so it remained for many centuries, until it was recently discovered and excavated by the Defendants. When discovered it was lying embedded in the clay at a depth from the surface of four feet at one end and six feet at the other; and now that it is brought to the surface it appears to be a boat of rude construction, forty-five feet in length, hollowed out of a single oak tree. The wood has not become petrified or fossilized, but retains the properties of wood.

A discussion took place at the Bar whether the boat, just previously to its discovery, ought in point of law to be considered as a mineral, or as part of the soil in which it was embedded, or as still retaining the character of a chattel. It was one or other of these three things. In my opinion, for the reasons subsequently to be given, it is not necessary to decide which it was. In support of the contention that it was a mineral, reference was made to the case of *Hext* v. *Gill* (1), and to the statement in the judgment of Lord Justice *Mellish* (with which Lord Justice *James* concurred), that the term "minerals" includes every substance which can be got from underneath the earth for the purpose of profit. The terms of this definition are wide enough to include the boat; but I am not aware that the term "minerals" has ever been held to include anything except that which is part of the natural soil. Unquestionably coal is deemed in law a part of the natural soil, without regard to what geologists may shew to have been its

(1) Law Rep. 7 Ch. 699.

origin. In law the natural processes by which the trees of a forest have become coal are not investigated: the result only is considered. But the boat has not become petrified or fossilized; it always has been distinguishable from the natural soil itself. If, therefore, I were required to decide the question, I should hold that it is not a mineral. In support of the contention that it ought to be deemed in law as part of the soil in which it was embedded, reference was made to the principle embodied in the maxim, "*Quicquid plantatur*," or as it is sometimes stated (see *Broom's* Legal Maxims (1) and the judgment in *Climie* v. *Wood* (2)) "*fixatur solo, solo cedit.*" This principle is an absolute rule of law, not depending on intention; for instance, if a man digs in the land of another, and permanently fixes in the soil stones or bricks, or the like, as the foundation of a house, the stones or bricks become the property of the owner of the soil, whatever may have been the intention of the person who so placed them there, and even against his declared intention that they should remain his property. Nor does it appear to me to be material that the things should have been placed there by the hand of man; it would seem to be sufficient if they have become permanently fixed in the soil by the operation of natural causes. In support of the contention that the boat always remained a chattel, it was or may be urged that, though embedded in the soil, it always was distinguishable from the soil itself, and preserved its original character of a chattel, which it certainly now is. Not long ago there was discovered, in the course of making excavations in *Hampshire*, a jar containing Roman coins—not gold or silver coins, and therefore not falling within the royal prerogative of treasure trove: apparently the coins formed the small change of the treasure of a Roman legion. Could it be said that the jar or the coins were part of the soil within the principle referred to? Similarly a short time since there was found beneath the soil (I believe in *Devonshire*) a Roman lamp of ingenious construction made of lead, and in an excellent state of preservation: a similar question may be asked of the lamp. But, as I have said, it is not necessary to decide these or the like interesting questions in the present case.

(1) 6th Ed. p. 376, n. (2) Law Rep. 3 Ex. 257, 260.

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The first question which does actually arise in this case is whether the boat belonged to the Plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the Plaintiff, for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. The principle of the decision of the Court in *Reg.* v. *Rowe* (1), appears to me to apply. There the question was whether the property in some iron lying at the bottom of a canal was well laid in the indictment in the canal company. The water had been taken out for the purpose of cleaning the canal, and the prisoner was indicted for stealing the iron which had been dropped into the canal by the owner. The Court held that the canal company had a sufficient property in and possession of the iron to support the indictment. If the fact of the iron having been left on the surface of the ground covered by water was sufficient to give in law possession of the chattel to the person in possession of the land, it appears to follow *à fortiori* that the facts of this case justify me in holding that the Plaintiff was in possession of the boat. For the boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil and waste of the inheritance: *Blades* v. *Higgs* (2) and *Holmes'* The Common Law, title "Possession" (3). The Plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the

(1) Bell's C. C. 93.
(2) 13 C. B. (N.S.) 844; 11 H. L. C. 621.
(3) Page 223.

spot where it was found. The Plaintiff, then, had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference, in these circumstances, that the Plaintiff was not aware of the existence of the boat.

The Defendants' claim must then rest on the lease, and what has been done or what has occurred since it was granted, including the finding of the boat.

The boat did not pass to them by the mere demise; a lease being only a contract for the possession and profits of the land: *Bac.* Abr. tit. Leases and Terms for Years (1). By the lease the Defendants covenant to build a wall round the demised property, but they do not covenant to construct a gas holder. The construction of such a work is, however, contemplated by the lease. The covenant by the lessees in regard to the gas holder is ungrammatically expressed, but the substance of it is clear. It is a covenant to the effect that any gas holder which they may construct shall be in accordance with plans previously approved of on behalf of the lessor. Plans were accordingly submitted and approved. These plans involved the excavation of the ground where the boat lay embedded, and to a depth below the bottom of the boat. The Defendants discovered the boat in making these excavations pursuant to the plans. The lease did not give any license to make the excavations, but the approval of the plans was equivalent in law to a license to make the excavations. The plans, however, are silent as to what is to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the lessors the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly be deemed to

(1) Vol. iv. p. 632.

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have contemplated would be found in making the excavations; but beyond this point it ought not to be carried. The existence of the boat was unknown and its discovery was not contemplated. In my opinion, then, the license to remove and dispose extended to the clay and ordinary soil likely to be found in pursuing the license to excavate, but it did not extend to what was unknown and not contemplated, and therefore did not comprise the boat. If the boat ought to be considered as a mineral (which I think it was not) then it fell within the express exception of minerals contained in the lease; against this express exception no implication ought to be raised. If, however, the boat ought to be considered as part of the soil by reason of its having become permanently affixed to it, or if it ought to considered as a chattel, it would be unreasonable to infer that it was intended to be included. Further if it ought to be regarded as a chattel, the Defendants did not acquire any property in the chattel by the mere finding as against the Plaintiff, who upon the grounds already stated was the owner of the chattel.

For these reasons I hold that the Plaintiff is entitled to the boat.

The Defendants were accordingly ordered to deliver the boat to the Plaintiff, and to pay the costs of the action.

Solicitors: *Tamplin, Tayler & Joseph*; *Collyer-Bristow, Withers, Russell & Hill*, agents for *Freer, Hett & Hett, Brigg.*

F. G. A. W.

ALLGOOD *v.* MERRYBENT AND DARLINGTON RAILWAY COMPANY.

CHITTY, J
1886
July 9.

[1883 A. 1766.]

Railway Company—Unpaid Vendor—Lien—Injunction.

Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, and an order has been made in such action that the Defendants should on or before a day named pay the purchase-money and interest, with a declaration that the Plaintiff was entitled to a lien on the lands in respect of the purchase-money, interest, and costs, and that in default of payment the Plaintiff was to be at liberty to apply to enforce such lien, such order containing no order for sale, the Court will on default in payment, there being evidence that the land is unsaleable, grant an injunction to restrain the Defendants from running trains over the railway and from continuing in possession of the land.

Williams v. *Aylesbury and Buckingham Railway Company* (1) and *Munns* v. *Isle of Wight Railway Company* (2) discussed.

MOTION.

On the 6th of April, 1873, the Defendants, under the powers vested in them by their Act, entered upon and took for the purposes of their undertaking certain lands belonging to the Plaintiffs.

The purchase-money and compensation to be paid by the Defendants for the land was agreed upon between the Plaintiffs and Defendants at the rate of £120 per acre, and amounted altogether to £1101 15*s*.

An order for the compulsory winding-up of the company was under the powers of an Act of Parliament passed for that purpose, made on the 9th of July, 1878, and an official liquidator was duly appointed.

At the date of the winding-up order the purchase-money for the land so taken by the company remained unpaid.

On the 24th of November, 1883, the Plaintiffs commenced this action against the company claiming a declaration that they were entitled to a lien for the £1101 15*s*. unpaid purchase-money,

(1) 28 L. T. (N.S.). 547; 21 W. R. 819. (2) Law Rep. 5 Ch. 414.

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and £330 for interest, and payment of the same, or in default sale or foreclosure and possession.

By judgment of the 27th of October, 1884, it was by consent ordered that the Defendants should on or before a day named pay to the Plaintiffs the sum of £1101 15s., with interest thereon from November, 1877, and it was ordered that a conveyance should be executed, and by consent it was declared that the Plaintiffs were entitled to a lien upon the lands in respect of the purchase-money, interest, and costs, and it was by consent ordered that in case of default being made in such payments the Plaintiffs were to be at liberty to apply to the Judge at Chambers to enforce such lien, and any of the parties were to be at liberty to apply generally as they might be advised.

The purchase-money not having been paid in pursuance of the above order, and there being moneys in the hands of the liquidator arising from profits made by the railway, which was being worked, the Plaintiffs now moved that notwithstanding the above order the Defendants might be ordered to pay into Court the purchase-money and interest from the 24th of November, 1877, and the sum of £23 8s. 6*d.* taxed costs, and in default of such payment that the Defendants, their servants and agents, might be restrained from running or causing or permitting to run over the land, or any part thereof, any train, engine, carriage, truck, or waggon, and from continuing or being in possession of or using the land or any part thereof until further order, and that the Plaintiffs might be put in possession of the land.

It appeared from the evidence that the lands if offered for sale by auction or private contract would not sell at the price of £120 per acre, and were in fact wholly unsaleable.

Farwell, in support of the motion, asked for the same order that was made in *Williams* v. *Aylesbury and Buckingham Railway Company* (1), and referred to *Seton* on Decrees (2).

Oswald, for the liquidator:—

The Court will not now grant the injunction asked for. The proper course is to direct the land to be put up for sale by auction

(1) 28 L. T. (N.S.) 547; 21 W. R. 819. (2) 4th Ed. p. 1331.

or private contract. That was what was done in *Williams* v. *Aylesbury and Buckingham Railway Company* (1).

[He also referred to *Munns* v. *Isle of Wight Railway Company* (2), and *Latimer* v. *Aylesbury and Buckingham Railway Company* (3).]

Farwell, in reply.

CHITTY, J. :—

The Defendants, the railway company, entered into possession of the land as long back as 1873, and the price to be paid as purchase-money was agreed on. The company proved unsuccessful, and an Act of Parliament was passed in 1878 authorizing the abandonment of the company. The company has been wound up. Upon the affidavit of the liquidator, who also was the receiver, it appears that the company is wholly insolvent. The liquidator or receiver, I know not correctly in which character, has some money in hand, and the contention intended to be brought forward, as I understand it, is this—that the money is not applicable for the payment of the purchase-money. There is a claim for the purchase-money, in fact no part of it has been paid, although these writs were issued ten years after the company obtained possession, and judgment taken by consent. The order is in substance this, namely, an order upon the company to pay the whole of the purchase-money on or before the 23rd of January, 1885, and upon the payment of the purchase-money, interest, and costs, a conveyance to be executed by all the proper parties, and then the order declares that the Plaintiffs are entitled to a lien upon the land, and in case of default the Plaintiffs were to be at liberty to apply to the Judge in Chambers, and any of the parties were to be at liberty to apply as they might be advised.

Under these circumstances, and after long delay and many negotiations, the vendors still remained without their purchase-money, and there has been no order for a sale upon the reservation contained in the order I have just read. It appears that Lord *Selborne* in the case of *Williams* v. *Aylesbury and Buckingham Railway Company*, after the order had been made for a

(1) 28 L. T. (N.S.) 547; 21 W. R. 819. (2) Law Rep. 5 Ch. 414.
(3) 9 Ch. D. 385.

CHITTY, J. 1886 ALLGOOD v. MERRYBENT AND DARLINGTON RAILWAY CO.

sale, made an order in the form that Mr. *Farwell* asks for at the Bar, and that is the order asked for upon the present notice of motion.

The order asked for in *Williams* v. *Aylesbury and Buckingham Railway Company* (1) was for delivery of possession to the plaintiff, but the Lord Chancellor declined to make that order in the first instance, because he said that the plaintiff had elected to take his remedy founded on a lien, and obtained an order for sale, and consequently he declined to make the order which is stated in *Seton* on Decrees (2), unless it was proved to his satisfaction that the order for sale would not be carried out. He subsequently made the order which is stated in *Seton*, which I have mentioned. In this case the evidence on the part of the Plaintiffs, which is uncontradicted, is to the effect that the lands would not sell if offered for sale by auction at the price of £120 an acre, which was the sum agreed upon, and what is said is this, that the lands are wholly unsaleable. Now the vendors' argument is this, they say that they are dealing with an insolvent company, and if there is an order now made for the sale it would be only putting the Plaintiffs to unnecessary expense. The reserve price would probably be fixed at such a sum as would enable the vendors to get back the purchase-money. I cannot say at the present moment how that may be. No doubt it would be worthy of consideration as to what the reserve price should be, but I leave that entirely open. There are two remedies, the one is to force a sale, and the other is to ask for a rescission of the contract and for possession. The Lord Justice *Selwyn* stated the law with regard to this matter correctly, if I may say so with respect to him, in the case of *Wing* v. *Tottenham and Hampstead Junction Railway Company* (3). He said (4): "I have no hesitation in saying that the whole practice of the Court shews that a vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other person." If this case was one between ordinary persons after this lapse of time could not the vendor come and say, "I cannot get my purchase-money, am I not

(1) 28 L. T. (N.S.) 547; 21 W. R. 819.
(2) 4th Ed. p. 1331.
(3) Law Rep. 3 Ch. 740.
(4) Ibid. 745.

entitled to rescind the contract—I ask the Court to give me an order to rescind the contract." The vendor would be entitled to ask for possession of his land. There is nothing in the case before Lord Justice *Giffard*, of *Munns* v. *Isle of Wight Railway Company* (1), to conflict with what I have stated. He in that case thought that there had been a miscarriage in granting the injunction, and, as I read his judgment, he thought it reasonable to discharge the injunction, and he made an order for a receiver with a direction against the company, who were to give immediate possession to the receiver.

I think, therefore, under these circumstances the Plaintiffs are entitled to the order they ask for. It is said that the public will be inconvenienced. That probably is so, but the public have no rights as such against an unpaid vendor. I therefore make the order.

Solicitors: *Cookson, Wainewright & Pennington*, agents for *Clayton & Gibson, Newcastle; Clarke, Rawlins & Co.*

G. M.

In re M'MYN.
LIGHTBOWN *v.* M'MYN.

[1878 M. 3.]

Administration—Married Woman—Funeral Expenses—Liability of Husband—Surety—Satisfaction of Judgment by Surety—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5 [*Revised Ed. Statutes, vol. xii., p.* 1012].

1. A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses.

2. The right of a co-surety under 19 & 20 Vict. c. 97, who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstance that such surety has not obtained actual assignment of the judgment.

FURTHER CONSIDERATION.

By will dated the 17th of December, 1876, and made under the powers vested in her by a settlement of April, 1873, *Mary*

(1) Law Rep. 5 Ch. 414.

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Alice M'Myn, who carried on business in partnership, apart from her husband, as a milliner and draper, appointed her husband, *J. K. M'Myn*, and two others, her executors, and bequeathed to *J. K. M'Myn* part of her interest in the partnership business (which constituted her separate estate), to the extent of £500, together with the household goods and certain life insurance policies, which were included in the settlement. The will contained other bequests, including one of the remainder of the share or interest of the testatrix in the business to her daughter, *A. M'Myn*, and from the proceeds of the business the sum of £230 to her aunt, *Nancy Lightbown*, being an amount of cash which had been lent by her to the testatrix.

The will did not contain any charge of debts, or funeral and testamentary expenses, and the estate was insufficient.

In February, 1878, the usual order for administration was made in an action instituted by *Nancy Lightbown*, who claimed as a creditor of the testatrix in respect of the debt of £230 with interest.

The action now came on for hearing on further consideration; and the first question was, whether *J. K. M'Myn*, the husband and executor of the testatrix, was entitled to retain out of her estate a sum of about £17 paid by him for the expenses of her funeral.

Hamilton Humphreys, for the Plaintiff, submitted that there was nothing to prevent the application of the ordinary rule that a husband is liable to pay the funeral expenses of his deceased wife and cannot throw them upon her estate: *Gregory* v. *Lockyer* (1); *Jenkins* v. *Tucker* (2); *Willeter* v. *Dobie* (3).

Renshaw, for the Defendants.

CHITTY, J.:—

In *Willeter* v. *Dobie* it is true that there was a charge by the wife of her funeral expenses. It is also true that the law casts upon a husband the duty of burying his wife; but the law does not on that account cast upon the husband the burden

(1) 6 Madd. 90.
(2) 1 H. Bl. 90.
(3) 2 K. & J. 647.

of burying his wife at his own cost always. In most cases the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him to bury her out of his own moneys in a case like the present, where the wife exercised her power of appointment, and made the fund general assets for her creditors but has omitted to mention her funeral expenses, would be too hard. I think, therefore, that the husband is entitled to retain the sums expended on her funeral.

A further question arose under the following circumstances:—

The testatrix and her mother and others had signed a guarantee to certain bankers to secure an advance made to a relative. Default in payment having been made by the relative, an action was brought in 1877, and judgment was recovered by the bankers against the co-guarantors. The testatrix's mother, *Alice M'Myn*, had paid the judgment debt by instalments, and accordingly no further proceedings were taken by the bankers. She had not taken an assignment of the judgment. The question was whether the legal personal representatives of the mother (who was now dead) were entitled to be paid out of the testatrix's estate, in priority to the other creditors, the amount of the contribution due from the testatrix.

Hamilton Humphreys, for the Plaintiff:—

The representatives of *Alice M'Myn* are not entitled to priority. They have brought no action against their co-surety, nor recovered judgment.

Levett, for the representatives of *Alice M'Myn*:—

We are entitled to stand in the place of the judgment creditor. If nothing had been paid by the mother the judgment creditors would have had their whole debt paid out of the testatrix's estate in priority to the unsecured creditors. Our payment was not intended for the benefit of the testatrix's unsecured creditors, and by s. 5 of the *Mercantile Amendment Act*, 1856 (19 & 20 Vict. c. 94), a surety who pays the debt is entitled to have a judgment held by the creditor assigned to him. Our priority in

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respect of the judgment is unaffected by the *Judicature Act*, 1875, s. 10: *In re Maggi* (1).

Hamilton Humphreys, in reply:—

Under the *Mercantile Amendment Act*, 1856, s. 5, the representatives of *Alice M'Myn* should have obtained an assignment of the judgment.

Renshaw, for Defendants, the executors.

CHITTY, J.:—

The representatives of *Alice M'Myn* have not themselves obtained any judgment, and the question is whether in order to gain priority they should have obtained an assignment of the judgment. The *Mercantile Law Amendment Act*, 1856, s. 5, is as follows:—[His Lordship referred to the section.] I think effect should be given to the words of the section, which say that the surety may stand in the place and use the name of the creditor; it follows that the co-surety, notwithstanding that she has neither brought an action nor had an assignment of the judgment, is entitled to obtain what she has paid in excess of her fair contribution, and to have priority over the unsecured creditors of the testatrix. That puts the unsecured creditors in no worse position than if the judgment creditors had exhausted their whole claim by enforcing it against the testatrix's estate. I therefore hold that the representatives of *Alice M'Myn* are right in their contention.

Solicitors: *Shaw & Tremellen*, agents for *Hall, Baldwin, & Weeks, Clitheroe; Bower, Cotton, & Bower*, agents for *Ainsworth, Sanderson, & Howson, Blackburn.*

(1) 20 Ch. D. 545.

F. G. A. W.

KURTZ *v.* SPENCE.

CHITTY, J.

1886

Aug. 12.

[1886 K. 1824.]

Patent—Action for Injunction against Threats of Legal Proceedings—Validity of Defendant's Patent—Infringement—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 26, 29, 32, 46.

In an action commenced under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, for an injunction to restrain a patentee from issuing threats of legal proceedings, the validity of the patent cannot be tried, the only issue in such an action being infringement or no infringement.

So, where in an action commenced under the above section, the Plaintiffs in their statement of claim alleged that the Defendants' patent was invalid, such allegation was ordered to be struck out.

ADJOURNED SUMMONS.

The Defendants were the owners of certain letters patent dated the 11th of August, 1882, for an alleged invention of "Improvements in the manufacture of alum and other salts of alumina," in the statement of claim referred to as "*Spence's* invention."

The Plaintiffs were the owners of certain letters patent dated the 12th of August, 1882, for an invention of "Improvements in the manufacture of certain chemicals and in their purification from iron," in the statement of claim referred to as "*Kynaston's* invention."

The Defendants having alleged that the use by the Plaintiffs of *Kynaston's* invention was an infringement of *Spence's* patent, and that the Plaintiffs were using *Spence's* invention, and having threatened the Plaintiffs with legal proceedings and liability in respect of their manufacture and their use of *Spence's* invention, the Plaintiffs, under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, commenced this action for an injunction to restrain the Defendants from threatening the Plaintiffs by circulars or otherwise with any legal proceedings or liability in respect of the Plaintiffs' manufacture, or of any use by the Plaintiffs of *Kynaston's* invention, or any use by the Plaintiffs of *Spence's* invention.

The Plaintiffs in the 6th paragraph of their statement of

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claim alleged that *Kynaston's* invention was entirely different from *Spence's* invention, and that the use of *Kynaston's* invention was not an infringement of *Spence's* patent, and that they had never used *Spence's* invention, or in any manner infringed *Spence's* patent. The paragraph also contained the following words: "Moreover the said *Spence's* patent is invalid." The Plaintiffs further alleged that the Defendants had not commenced and refused to commence either against the Plaintiffs or any other person any action for infringement of *Spence's* patent.

The Defendants took out a summons, which was adjourned into Court, and now came on for hearing, that the words above referred to in the 6th paragraph of the statement of claim, "Moreover the said *Spence's* patent is invalid," might be struck out of the statement of claim.

Chadwyck Healey, in support of the summons:—

In an action commenced as this is under sect. 32 of the Act of 1883, the question of the validity of the patent is not in issue, the only question to be tried is infringement or no infringement. The words objected to must be struck out.

[He referred to *Halsey* v. *Brotherhood* (1).]

Lawson, for the Plaintiffs:—

The term "legal rights," in the 32nd section must mean rights which can be enforced in a Court of Justice, and it is absurd to say that those are "legal rights" which are founded on an invalid patent. The Legislature must have intended that the validity of the Defendants' patent should be tried in an action commenced under sect. 32. If that is not so, the Plaintiffs will be put to take another proceeding for the purpose of impeaching the letters patent, and that could not have been intended by the Legislature.

[He referred to *Rollins* v. *Hinks* (2); *Wren* v. *Weild* (3); *Halsey* v. *Brotherhood*.]

Chadwyck Healey, in reply.

(1) 19 Ch. D. 386. (2) Law Rep. 13 Eq. 355.
(3) Law Rep. 4 Q. B. 730.

CHITTY, J.:—

The question is whether a statement impeaching the validity of the Defendants' patent ought to be struck out of the Plaintiffs' statement of claim.

The claim of the Plaintiffs is made under the provisions of sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883. The law at the time the Act was passed is plain. An action for an injunction against threats being made by a person claiming to be a patentee, or to have the benefit of the patent, could be brought; but in such an action the validity of the patent was not in issue. There were two issues: one, the good faith of the person making the threat, and the other whether the person against whom the threat was made was in fact infringing the letters patent. In the action, as I have described it, before this section came into operation, it was assumed that the great seal had been affixed to a valid patent, and the person who had the benefit of the patent was entitled to rest upon that assumption. Then, as now, letters patent could be revoked by a proper proceeding. It was technically called *scire facias* before this Act, and there are proceedings of a somewhat analogous nature authorized by the Act of 1883.

Now the real question that I have to decide is the meaning of the words "legal rights" in sect. 32. According to the argument of the Defendants the law remains as it was with this alteration, and with this alteration only, namely, that the question of *bona fides* is not to be raised, and the simple issue is infringement or non-infringement of the letters patent. I will read the section: "Where any person claiming to be the patentee"—that means, having regard to the 46th section, any person claiming to be entitled to the benefit of the patent, or any person in a similar position having an interest in the patent, within the 46th section—"threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related

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was not in fact an infringement of any legal rights of the person making such threats."

Now it appears to me that the true reading of that section is to confine the issue to the infringement, and not to allow the validity of the patent to be tried. The term no doubt is "legal rights," and upon that it has been argued with some force that it must mean a right which can be enforced in a Court of justice, and that it is absurd to say that that is a legal right which is founded upon an invalid patent. But, I think, having regard, as I am entitled to have regard, to the state of the law when this section was passed, that the Legislature did not intend to permit that in such an action as this the validity of the patent should be directly brought forward, and intended only to allow the question of infringement to be tried. I think that is so on the reading of the words. I think the Legislature would have inserted some words relating not merely to infringement but some words relating to the validity of the patent itself, and would not, by so compendious a term as this, have intended that this larger question should be tried in what I may term a subordinate action.

This construction, I think, is supported by the other parts of the Act. It is said that if I do not adopt the Plaintiffs' construction then the Plaintiffs will be put to take another proceeding for the purpose of impeaching the letters patent. I see no objection to that. Stating the objection fairly that does not seem to me to form any ground of objection against what I have already expressed my opinion is the right construction. I think it would be much more convenient that there should be a separate proceeding. The 26th section abolishes the proceeding by *scire facias* to repeal a patent and prescribes a new mode of procedure, and it allows a large class of persons to take the proceedings. First, there is the Attorney-General; secondly, there is anyone authorized by the Attorney-General, and that authority would always be granted by the Attorney-General in a proper case; thirdly, there is any person who alleges that the patent was improperly obtained in fraud of his rights; fourthly, there is any person who was the true inventor of the patent which has been granted according to his allegation without due caution to a person who was not; and, lastly, there is that large class of

persons who are included under sub-sect. (*e*) who allege that they have publicly manufactured, used, or sold within the realm before the date of the patent anything claimed by the patentee as his invention. Of course the last is a wide section, affording what I may term protection to the trade to which the invention relates.

The section further provides that the plaintiff—as he is here termed—must deliver particulars of the objections on which he intends to rely, and no evidence shall except by leave be admitted in proof of any objection of which particulars are not so delivered; and in order to put the patentee, who is in possession of the grant from the Crown, in a fair position for the trial of the validity of the patent, the same section provides that he, the defendant, shall be entitled to begin, and that if the plaintiff gives evidence impeaching the validity of the patent, the defendant shall be entitled to reply.

I have mentioned these provisions in order to contrast them with what would be the effect of the construction which the Plaintiffs seek to place on the 32nd section.

The 32nd section makes no provision for the delivery of the particulars of objections, and it is plain that under that section the plaintiff—that is the person who is seeking to obtain the injunction against the threats issued by the person claiming the benefit of the patent—must begin. So that the patentee will have to defend the validity of his patent in a manner which the Legislature did not think the proper one where the patent is regularly impeached under the proceedings adopted by *scire facias;* and as far as the action goes there would be no necessity for the delivery of his particulars of objections. Mr. *Lawson*, seeing the force of this argument, said that there was an inherent jurisdiction in the Court in such a case to order delivery of particulars of objections. I do not say there is not some foundation for that argument, but in the Act of 1883 there are contained special provisions binding on the Court in the case where an action is brought for the infringement of the patent, in which action of course the plaintiff, the patentee, begins, and in which action the validity of the patent can be regularly attacked. Without reading the 29th section through, which relates to an action for

CHITTY, J. 1886 KURTZ v. SPENCE.

infringement, I may say it contains very carefully framed provisions enacted with reference to the old law as it existed at the time. I refer to that because the question is one of the construction of the Act of Parliament, and it appears to me that if it had been the intention of the Legislature under this short term "legal rights" to allow the validity of the patent to be tried, it would have inserted in the 32nd section some provisions corresponding with those in the 29th section, or by some subsidiary section have made the 29th section apply in full force to the 32nd section. But that is not so.

The result is, that I think the validity of the patent cannot be brought into issue in any action commenced under the 32nd section. The 32nd section contains at the end a proviso that the section is not to apply if the person making the threats "with due diligence commences and prosecutes an action for infringement of his patent." There is a slight change of language there from the words "legal rights" to the word "patent." I am unable from that to draw any inference as to the meaning of the words adverse to the Defendants' contention. I mention the proviso for this reason, that this which I may call a special remedy given by the 32nd section is not to take effect if the patentee—I use that term for shortness—will himself commence an action for infringement. It is known in practice that the patentee in some cases finds a pauper using his invention, and as the expense of an action of this kind is almost proverbial, there are cases in which the patentee utters the threat, but will think twice before commencing proceedings, because of the expense and the small chance or no chance of getting the costs paid. But this proviso says in substance that he is not to be sued for the threats if he will institute his action, and he may at the risk of not getting his costs paid institute the action for infringement. That of course is a proviso for the benefit of the patentee, and I find sufficient to satisfy me, that the person threatened or unduly threatened or affected by the undue threats of the patentee has on the other hand a sufficient protection, sufficient at all events in the view of the Legislature, conferred on him by the provisions of the 26th section to which I have already referred.

I put these two sections together to shew that they are not

exactly correlative but corresponding remedies given to the patentee on the one hand and, to put it generally, to the person impeaching the validity of the patent on the other. I mention these additional reasons in support of the conclusion at which I have arrived. I think, therefore, that the words "moreover the said *Spence's* patent is invalid" must be struck out of the statement of claim.

Solicitors for Plaintiffs: *C. P. Pritchard & Marshall*, agents for *G. R. Rogerson & Co., Liverpool.*

Solicitors for Defendants: *Jaques & Co.*

G. M.

NORTH, J.
1886
July 1, 9.

In re BOWES.
EARL OF STRATHMORE *v.* VANE.

[1885 B. 5880.]

Banker's Lien—Memorandum of Deposit.

A customer deposited a policy of life assurance with his bankers, accompanied by a memorandum of charge to secure overdrafts, not exceeding a specified amount. In an action to administer the customer's estate:—*Held*, that the banker's general lien was displaced, and the charge was limited to the amount specified.

THIS was a summons in an action for the administration of the estate of *John Bowes*, deceased, brought by his executors, to determine the extent to which Messrs. *Backhouse & Co.*, bankers, of *Barnard Castle*, had security on a policy of life assurance deposited with them by the deceased.

The policy was for £5000, payable on the death of *John Bowes*. At the time of the deposit *John Bowes* signed a memorandum which expressed that he thereby deposited with Messrs. *Jonathan Backhouse & Co.* the policy in question, "to the intent that they, the said *J. Backhouse & Co.*, may become and remain equitable mortgagees of the said policy and the moneys thereupon to be received, for securing to the said *J. Backhouse & Co.*, and other the partners for the time being of their firm or carrying on their business, the repayment of all sum and sums of money now due, or which shall or may at any time or times hereafter become or be for the time being due or owing from him, the said *John Bowes*, on balance of account current, or on any bill of exchange or promissory note drawn, made, accepted, or indorsed by the said *John Bowes*, and discounted by the said *J. Backhouse & Co.*, or by advance or loan, or in any manner whatsoever, not exceeding in the whole at any one time the sum of £4000, together with interest for the same at such rates as shall for the time being be agreed upon, or, in default of such agreement, then at the usual and current rates charged by the said *J. Backhouse & Co.* in like

cases, together also with commission, and all other usual bankers' charges," and that the depositor further agreed "that in case the said *J. Backhouse & Co.* shall by letter or writing sent by post to the said *J. Bowes*, or left at his last or most usual place of abode in *England*, at any time require payment of all the sum and sums of money for the time being due on the security hereof, and the same shall not be fully paid and satisfied within one calendar month thereafter, then that he, the said *John Bowes*, will forthwith, by a proper deed of mortgage to be prepared by the solicitor of the said *J. Backhouse & Co.* at the expense of the said *J. Bowes*, assign and assure the said policy and premises unto them, the said *J. Backhouse & Co.*, for securing repayment of the same moneys, and effectually charge a sufficient part of the estates in the county of *Durham* or *York* of which the said *J. Bowes* is tenant for life under the will of the late Right Honourable *John Bowes*, Earl of *Strathmore*, with the annual premium necessary for keeping on foot such policy, and the interest of the money so to be due to the said *J. Backhouse & Co.*, such mortgage to contain a full and complete power of selling the said policy and premises or of surrendering the same to the office and of giving valid and sufficient receipts for the moneys to be received thereby, and all other usual and proper powers, provisoes, and authorities as a solicitor of the said *J. Backhouse & Co.* shall deem necessary, and that in the meantime he, the said *J. Bowes*, will punctually pay the premiums due on the said policy as and when the same shall become due, and do and perform all other acts and things necessary to keep the same policy on foot."

John Bowes died on the 9th of October, 1885. At that time he was overdrawn with Messrs. *Backhouse & Co.* to an amount exceeding £5000.

Deane (*Cozens-Hardy*, Q.C., with him), for the executors of *John Bowes*:—

There is a written instrument defining the terms of the contract of deposit. Those terms exclude the existence of a general lien: therefore the charge must be limited to £4000, and any interest accrued and any commission the bankers are entitled to.

NORTH, J. 1886 *In re* BOWES. EARL OF STRATHMORE *v.* VANE.

Napier Higgins, Q.C., and *Innes Watson*, for Messrs. *Backhouse*:—

The bankers' general lien over-rides a special lien or exists in addition to it: *Jones* v. *Peppercorne* (1).

NORTH, J.:—

It is said that the bankers have a bankers' lien; that *Bowes* was their customer, and handed over to them the policy as security, that they had it in their hands and were entitled to hold it, not only for the £4000, interest and commission, for which they had a written agreement, but that in addition they had a further right as bankers to hold it in respect of the rest of his debt to them: or in other words they claim a right under the special contract in writing and also under an implied contract.

It appears to me that that is inconsistent with the terms of the agreement, which is for a security for a sum not exceeding £4000 principal and no more, with interest and commission, and that when the contract says in so many words that the charge is for a sum not exceeding £4000 the charge is limited to that amount.

The case of *Jones* v. *Peppercorne* was relied upon by Mr. *Higgins* as an authority that the general lien was to prevail. This case, however, seems to me much more like the case of *Wylde* v. *Radford* (2) before Vice-Chancellor *Kindersley*. *Jones* v. *Peppercorne* was a case in which securities had been pledged with brokers under circumstances which gave a right of sale, and the right of sale had been exercised. It was not suggested that the sale was wrong in any way: and it may well be that bankers who have a power of selling securities deposited, when they have sold, and have clear money in their hands after satisfying the charge, may be entitled to say they will set off that money against further sums due to them; but that seems to me a totally different case from the present, where the security is of a wholly different nature, and the bank had no power of sale. It is quite true that if, after a demand for payment had been made, the

(1) Joh. 430. (2) 33 L. J. (Ch.) 51.

bank might have insisted on having a mortgage with a power of sale. No such demand was made or mortgage given, the bank never had a power to sell and convert the policy into money. The case of *Wylde* v. *Radford* (1) seems to me one which I cannot distinguish. There there was a deposit of deeds relating to two properties accompanied by a written memorandum. It appeared from the memorandum that the deposit was for the purpose of pledging one of the properties to which the deeds related, and it was held that as the deposit was for the special purpose of giving a security upon one property only the bankers could claim no general lien by the custom of bankers upon the other property. Now it appears to me that if Mr. *Higgins*' argument is correct here, and there is an express contract for a security up to £4000 and an implied contract beyond that, a similar contract would have been implied in that case. I cannot distinguish the two cases, except that in that case the security was limited to a part of the property included in the deposited deeds, and in this case the security is limited to cover a part only of the debt. It seems to me that the express terms of this deposit were that sums not exceeding £4000 were to be paid out of the policy moneys, and it would be inconsistent with that, in the absence of any additional agreement, to allow the bank to hold the policy for something more.

The bank is entitled to an inquiry what is due for interest and commission and to retain that amount in addition to the £4000.

Solicitors for the executors: *Western & Sons.*

Solicitors for Messrs. *Backhouse & Co.*: *Ridsdale & Son,* agents for *Watson Brothers, Barnard Castle.*

(1) 33 L. J. (Ch.) 51.

D. P.

NORTH, J.

1886

July 10.

In re GARDINER'S TRUSTS.

Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34, 35 [*Revised Ed. Statutes, vol. x., p.* 990]—*New Trustee—Decrease in Number of Trustees—Vesting Order—Jurisdiction.*

Where one of three trustees was an absconding bankrupt, the Court refused, notwithstanding evidence of great difficulty in getting a third person to act as trustee, to appoint the solvent trustees in place of themselves and the bankrupt, and to make an order vesting the trust estate in the solvent trustees alone: on the ground that the Court will not reduce the number of trustees of a continuing trust; and also that there is no power to appoint existing trustees to be new trustees.

THIS was a petition for the appointment of *Henry John Gardiner* and *Robert Gresley Hall* (two out of the three trustees of the will of *Henry Gardiner*, deceased) trustees of the will in the place of themselves and the third trustee, *George Bernard Harvey Drew*, for an order vesting in *Henry John Gardiner* and *Robert Gresley Hall* alone the lands and hereditaments, the right to call for transfers of, and to transfer, shares and securities, and to sue in respect to *choses in action*, subject to the trusts of the will.

The petition contained the following allegations:—

"The said *George Bernard Harvey Drew* has recently absconded, and his whereabouts is wholly unknown. He was adjudicated bankrupt on the 31st of March, 1886.

"It is essential that the name of the said *George Bernard Harvey Drew* should be removed from the trusteeship in order to deal with the various assets of the testator mentioned in the said schedule hereto, many of which require immediate action on the part of the remaining trustees, your Petitioner *Henry John Gardiner*, and your Petitioner *Robert Gresley Hall*, as to which however, at present, their hands are tied by reason of the absence of the said *George Bernard Harvey Drew*.

"The securities in which the testator's estate is invested, and all of which existed at his death, ought to be realized, but the absence of the said *George Bernard Harvey Drew* prevents this being done, and though they are believed to be very valuable securities, some

of them involve very heavy personal liability for possible future calls.

"Under the above circumstances there is very great difficulty in finding any really responsible person to come into the trusteeship in the place of the said *George Bernard Harvey Drew*. Strenuous and repeated efforts have been made to obtain a third person to join with your Petitioners, *Henry John Gardiner* and *Robert Gresley Hall*, in executing the trusts of the said will, but notwithstanding such efforts, no third person can be found to undertake the responsibility of the said trusts.

"Your Petitioners, the said *Henry John Gardiner* and *Robert Gresley Hall*, are willing to act and to give such undertaking as this Honourable Court may think fit that in the event of either of them becoming sole trustee of the said will he shall forthwith take steps to appoint, or apply to this honourable Court for the appointment, of some other person or persons to be appointed with him in the execution of the said trusts."

Giffard, Q.C., and *George Borrett*, for the petition:—

In the earlier cases the Court found no difficulty in making such an order as is now asked: *In re Stokes' Trusts* (1); *In re Harford's Trusts* (2); *In re Tatham's Trusts* (3). But the Court of Appeal refused to do so in *In re Aston* (4); that case was followed by Mr. Justice *Pearson* in *In re Lamb's Trusts* (5); but, under exceptional circumstances, notwithstanding *In re Aston*, the Court has since made such an order: *In re Martyn* (6); *Davies* v. *Hodgson* (7). We submit that the extreme difficulty in getting a trustee is such an exceptional circumstance as to justify the Court in allowing only two trustees to be appointed, and thus enable the administration to go on without delay.

NORTH, J.:—

It seems to me I cannot make the order asked for because of the authorities. In the earlier case cited, *In re Stokes' Trusts*,

(1) Law Rep. 13 Eq. 333.
(2) 13 Ch. D. 135.
(3) W. N. 1877, p. 259.
(4) 23 Ch. D. 217.
(5) 28 Ch. D. 77.
(6) 26 Ch. D. 745.
(7) 32 Ch. D. 225.

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a successor to a trustee who wished to retire could not be found, and Lord *Romilly* held that he could appoint the two continuing trustees to be sole trustees in the place of themselves and the other. A similar case came before the late Master of the Rolls in *In re Harford's Trusts* (1). There were four trustees, and one had absconded. It was held that the Court had jurisdiction to appoint the remaining three trustees in the place of themselves and the fourth. It is not stated in terms that there was an impossibility or serious difficulty in obtaining another trustee to act, but the Master of the Rolls asks the question: "Has the Court jurisdiction to appoint persons trustees who are trustees already? The 32nd section of the *Trustee Act*, 1850, says that the trustees to be appointed are to be 'new' trustees." *In re Stokes' Trusts* (2) was referred to. The Master of the Rolls says: "It appears that Lord *Romilly* made the order after full consideration; I will therefore make an order as prayed." Now, if the matter stood there, and those were the two authorities settling the practice now, I should at once follow them, and make the order asked for. There is one other case in which an order was made by Vice-Chancellor *Malins*, appointing two trustees of a will, who were willing to carry on a business in place of themselves, and a third, who was a stranger, and desired to retire, and it was found difficult to find a new trustee to fill his place.

Those are the cases in the Petitioners' favour. All the other cases from that time on seem to me inconsistent with their having the right to have the number of trustees diminished. First of all, in *In re Nash* (3), one of three trustees had become lunatic, and the Court of Appeal declined to act in the way I am now asked to act. Lord Justice *Cotton* says: "It is not usual to make such a vesting order as that now asked for, although the Court may have jurisdiction to make it under the section that has been referred to, without first requiring a new trustee to be appointed in the place of the lunatic. In my opinion the Court ought not, by vesting the trust property in two only of three trustees, to attempt to do indirectly what it has no power under that Act to do directly, that is, to remove a trustee without appointing

(1) 13 Ch. D. 135, 136. (2) Law Rep. 13 Eq. 333.
(3) 16 Ch. D. 503, 504.

another in his place." The petition stood over on amendment by asking for a new trustee to be appointed; and, fortunately for the parties, they were able to get a new trustee. The next case is that of *In re Aston* (1), where also one of the trustees had become lunatic. An unreported case of *In re Colyer*, in the Court of Appeal, was referred to, in which it appears Lord Justice *Cotton* had declined to follow the decision in *In re Harford's Trusts* (2). The Master of the Rolls said: "I adhere to the opinion which I expressed in *In re Harford's Trusts*, but as other Judges have an objection to make such an order, we must decline to make it; otherwise there would be a difference in the practice of the Judges of this Court," and, therefore, he treated *In re Harford's Trusts* as overruled, and the other Lords Justices concurred. Then there was the case of *In re Martyn* (3), a case in which one of three trustees of funds that were immediately divisible had become lunatic, and under the exceptional circumstances of the fund being immediately divisible the Court made an order giving the other two trustees the power to deal with the funds.

Then comes the case of *In re Lamb's Trusts* (4). The marginal note is this: "It is the settled practice of the Court under the *Trustee Acts* when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves and him. And though the Court will deviate from this rule and make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund." Mr. Justice *Pearson* adopted it as the settled practice of the Court that where there is a continuing trust the Court will not appoint a smaller number of trustees.

The only other case cited is that of *Davies* v. *Hodgson* (5), and in that case I saw my way under exceptional circumstances to make an order for the appointment of two continuing trustees in

(1) 23 Ch. D. 217.
(2) 13 Ch. D. 135.
(3) 26 Ch. D. 745.
(4) 28 Ch. D. 77.
(5) 32 Ch. D. 225.

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the place of themselves and a bankrupt trustee. It seemed to me there were two grounds in that case on which it might be done: in the first place the funds were to be paid into Court, and I do not see any difference between paying funds into Court and dividing them, for this purpose: and in the second place, an action for administering the trusts was actually pending, and the Court had complete control of the matter.

Under the above circumstances, I do not think it would be respectful to the Court of Appeal to attempt to draw a distinction between this case and the cases cited, and to make an order which, it seems to me, would be a departure from the rule laid down by the Court of Appeal.

I feel a further difficulty in this case because of what has happened in another case to-day. I am asked to appoint two trustees in the place of themselves and another existing trustee. I feel a difficulty in appointing two persons who are already trustees to be trustees *de novo*. I refer to the case of *In re Dewhirst's Trusts* (1), in which some earlier cases were cited where the Court has appointed existing trustees in order to have the jurisdiction to make a vesting order, but I decided, following the principle of *In re Vicat* (2), that the present practice is not to do so.

Under these circumstances I cannot do what I am asked. I must leave the parties to apply to the Court of Appeal to do this if they think proper.

[NOTE.—A person willing to become trustee was found, and was subsequently appointed.]

Solicitors: *Morice, Toller, & Blakesley.*

(1) Affirmed on appeal, *ante* p. 416. (2) *Ante*, p. 103.

D. P.

JENNEY *v.* MACKINTOSH.

NORTH, J.

1886 *July* 16.

[1886 J. 514.]

Practice—Service of Writ out of Jurisdiction—Action relating to Real Estate abroad—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*g*).

In an action to enforce against real estate in *Trinidad* the trusts of a creditors' deed (which had been established by a former suit in the Court of Chancery), the Defendants were persons in whom the legal estate was outstanding, one of them being a British subject resident in *Trinidad*. The other Defendants resided in *England*. An opinion was given by a barrister practising in *Trinidad* that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those Defendants who were in *England*:—

Held, that leave could be given to serve the writ on the Defendant who was in *Trinidad*.

MOTION *ex parte* for leave to serve the writ in the action on *H. G. Mackintosh*, one of the Defendants, out of the jurisdiction. The writ had been served on the other Defendants in *England*.

On the 27th of August, 1863, *Andrew Mackintosh* executed a deed by which he conveyed to trustees certain property, among which was some real estate in the island of *Trinidad*, on trust for the benefit of his creditors. By reason of the fact that the execution of the deed was attested by only one witness the legal estate in the *Trinidad* property did not, according to the law of that country, pass to the trustees.

In 1865 *Andrew Mackintosh* died, having by his will given and bequeathed all and singular his estate and effects whatsoever and wheresoever situate unto his executors thereinafter named, upon the trusts thereinafter declared. He declared trusts only of his personal estate, and there was no other devise of his real estate. He appointed his wife and his three sons *Andrew*, *Harry George*, and *Joseph*, executrix and executors of his will. The will was proved by the widow and the son *Joseph* alone. The testator left surviving him his widow *Margaret Ann Mackintosh*, and five sons, *Andrew Mackintosh*, *H. G. Mackintosh*, *Joseph Mackintosh*, *W. C. Mackintosh*, and *Edwin Mackintosh*, and one daughter, the wife of Dr. *Peart*. *Andrew Mackintosh* afterwards died.

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In 1875 an action of *Jenney* v. *Bell* was brought by *Charlotte Jenney* and *James Wait*, who were creditors of the testator, against *Alexander Bell*, the then trustee of the deed, and the two executors who had proved, to enforce the trusts of the deed, especially as against the *Trinidad* property. On the 30th of May, 1879, judgment was given by Vice-Chancellor *Malins* declaring that the estate of *Andrew Mackintosh* (except certain household furniture) and all the estate and interest which, at the date of the deed, he had in the *Trinidad* property, and any other property of his comprised in the deed (except the said household furniture) were liable to make good to the Plaintiffs the sum of 7*s.* 6*d.* in the pound on the sum of £3000, together with interest and costs. And it was declared that whatever (if any) estate or interest in the said hereditaments and premises passed by the will of *Andrew Mackintosh* was subject to such liability in favour of the Plaintiffs as aforesaid, and the Court did order and adjudge the same accordingly. And, the Defendant *Bell* being desirous of being discharged from the trusts of the creditors' deed, and undertaking to execute any proper deed which the Plaintiffs should require for the purpose of such discharge and for enabling the Plaintiffs to realize out of the said premises the amount to which they were entitled under the judgment, it was ordered that *Bell* should, upon executing such proper deed as aforesaid, be discharged from the trusts of the creditors' deed. And it was ordered that the Defendants *Joseph Mackintosh* and *Margaret Ann Mackintosh* should concur with the Plaintiffs in raising out of the hereditaments and premises declared liable as aforesaid such sum as should be sufficient to discharge the said sum of 7*s.* 6*d.* in the pound on £3000, with interest and costs.

After this judgment had been given the Plaintiffs discovered for the first time that the legal estate in the *Trinidad* property had not passed under the creditors' deed, and they had been unable to enforce the judgment against that property.

On the 10th of November, 1882, an order was made in the action of *Jenney* v. *Bell* appointing *James Wait* trustee of the creditors' deed, and he was now the sole trustee.

The writ in the present action was issued on the 9th of April,

1886, by the Plaintiffs in the former action. The Defendants were *Margaret Ann Mackintosh*, *Joseph Mackintosh*, *W. C. Mackintosh*, *Edwin Mackintosh*, and *H. G. Mackintosh*. The last-named Defendant resided in *Trinidad*. He was a British subject. Mrs. *Peart* and her husband had executed a deed conveying their estate and interest in the *Trinidad* property to the Plaintiff *Wait*, as trustee of the creditors' deed.

The indorsement on the writ claimed:—

That provision might be made under the direction of the Court for satisfaction, by sale or otherwise, out of the property subject to the deed, and in particular out of the *Trinidad* property, of the principal sum, interest, and costs to which by the decree in *Jenney* v. *Bell* the said property had been declared liable:

A declaration that all such estate or interest (if any) in the said property as was vested in the Defendants or any of them was subject to satisfy the said principal, interest, and costs:

That by conveyance from the Defendants, or by vesting order, or otherwise as was fit, the legal estate in the *Trinidad* property, or other property subject to the deed, might be vested in the Plaintiff *Wait* as trustee of the deed, or that the Defendants might be directed to concur, as the Court might think fit, in the realization by sale or otherwise of the *Trinidad* property and other property for the purpose of giving effect to the decree in *Jenney* v. *Bell*:

That if the Defendants or any of them had been in receipt or enjoyment of the rents of the *Trinidad* property they might be decreed to account for the same to the Plaintiff *James Wait* as such trustee as aforesaid:

Payment of the said principal sum, interest, and costs by the means aforesaid, or, if necessary, by administration of the estate of *Andrew Mackintosh*:

And that, if and so far as might be necessary, the action might be taken as supplemental to *Jenney* v. *Bell*.

The Plaintiffs had been advised by a barrister practising in *Trinidad* that, if the legal estate in the *Trinidad* property did not pass by the testator's will, it devolved on his death on all his six children in equal shares; and that on the death of *Andrew* the son his share descended to his brother *H. G. Mackintosh* as

NORTH, J. 1886 JENNEY v. MACINTOSH.

his heir. Also that under the law of *Trinidad* the creditors' deed bound the beneficial interest of the debtor and of all persons claiming through him in the *Trinidad* property.

The Plaintiffs' solicitor deposed that he was advised and believed that the Plaintiffs had a good cause of action against *H. G. Mackintosh* and the other Defendants, with a view of enforcing and obtaining the benefit of the decree in *Jenney* v. *Bell*.

H. G. Mackintosh had declined, when applied to for the purpose, to execute a deed conveying his share in the legal estate to the Plaintiffs.

Napier Higgins, Q.C., and *Medd*, for the Plaintiffs:—

The equitable title to the *Trinidad* property is clearly in the Plaintiff *Wait*; the object of the action is only to bind the legal estate: *In re Lane* (before Mr. Justice *Pearson* on the 9th of April, 1886), noted in the *Weekly Notes*, 1886, p. 80.

NORTH, J.:—

The barrister's opinion seems to shew that by the law of *Trinidad* the beneficial interest in the *Trinidad* property was bound by the creditors' deed. This being so, I think I may give leave to serve the writ on the Defendant who is in *Trinidad*.

Solicitors: *Maples, Teesdale, & Co.*, agents for *Lietch, Dodd, & Bramwell, Newcastle-on-Tyne.*

W. L. C.

In re FARNELL'S SETTLED ESTATES.

NORTH, J.

1886

July 17.

Settled Estate—Lease—Sanction of Court—Covenant to renew Lease at future Time—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *ss.* 4, 5 [*Revised Ed. Statutes, vol. xviii., p.* 333]—*Power to appoint Trustees—Exercise—Recital in Deed.*

The Court has no power under sects. 4 and 5 of the *Settled Estates Act*, 1877, to sanction a sub-lease of settled land (held under a renewable lease) for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not be a lease taking effect in possession.

A will contained a power for the trustees or trustee thereof to appoint new trustees. The trust property comprised a renewable lease. After the death of the testator a renewal of the lease was granted to four persons who had not been appointed trustees of the will, but who in the lease granted to them were described as "the present trustees" of the will. The surviving trustee and executor of the will was a party to this deed, and the demise was expressed to be made by his direction:—

Held, on the authority of *Poulson* v. *Wellington* (1), that this statement in the renewed lease operated as an appointment of the four lessees to be trustees of the will.

PETITION under the *Settled Estates Act*, 1877, to obtain the sanction of the Court to a conditional agreement for a lease of property settled by the will of *Henry Farnell*.

The testator by his will dated the 19th of June, 1859 (*inter alia*), gave and bequeathed his house, No. 102, *New Bond Street*, to hold the same unto his son *Henry* and his wife *Fanny* during their joint lives and the life of the survivor of them, they paying the ground rent and performing the covenants of the lease under which the house was held, and after the death of such survivor he gave the house unto the children of his son living at the time of the decease of his said son and *Fanny* his wife, in equal shares as tenants in common, and, if there should be but one child, then to such only child. And, in case all the children or child of his said son should be dead leaving issue, then the testator gave the same house unto and equally between the issue of such children or child, in equal shares if more than one; and, if there should be no such issue, then he gave the same house unto and equally between the children or child of his two daughters, *Margaret Ann*

(1) 2 P. Wms. 533.

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Walton and *Lavinia Louisa Day*, in equal shares, if more than one, as tenants in common. The testator appointed his brother, *W. T. Farnell*, and *H. Briggs* trustees for other purposes of his will, and he empowered the trustees or trustee for the time being of his will to appoint new trustees thereof. And he appointed *W. T. Farnell* and *H. Briggs* executors. The testator died on the 15th of May, 1863. *W. T. Farnell* died on the 4th of November, 1870.

Henry Farnell, the son, died on the 17th of July, 1885. He never had any child.

The house in *Bond Street* was held by the testator under a lease from the corporation of *London* for a term of forty years, renewable at the end of fourteen years on payment of a fine. On the 1st of November, 1866, the corporation granted a renewed lease for a term of forty years from Lady Day, 1866, to *W. T. Farnell* and *H. Briggs*, who were in the lease described as executors named in and appointed by the will of the testator, in trust for the purposes mentioned in the will. This lease contained a covenant by the lessors that they would at the end of fourteen years from Lady Day, 1866, execute a new lease of the house, with the like provisions, conditions, and covenants, unto the lessees in trust as aforesaid, for a term of forty years from the expiration of the fourteen years, and so from time to time for ever at the end of every fourteen years, upon payment of a specified fine, provided that an application for the renewal was made sixty days before the expiration of the fourteen years. On the 16th of June, 1881, the corporation granted a renewed lease of the house for a term of forty years from Lady Day, 1880, to *Henry Farnell* (the son), *T. T. Walton*, *O. F. Walton*, and *H. E. B. Walton*, with a similar covenant for renewal. In this lease the four lessees were stated to be "the present trustees" of the will of the testator, in trust for the purposes mentioned in the will. *Briggs* was a party to the lease, and was described as the surviving executor named in and appointed by the testator's will, and the demise was expressed to be made by his direction. The four lessees had never been formally appointed trustees of the will. *T. T. Walton* died on the 25th of December, 1885.

On the 18th of June, 1886, *Fanny Farnell*, the then tenant for life of the house, on behalf of herself and all other persons

interested in the house (thereinafter called the lessor), entered into a conditional agreement with *J. D. Hobson* to grant a building lease of the house to him. The agreement provided (*inter alia*) that, when and so soon as the lessor's architect for the time being should have given his certificate that the house and premises thereinafter agreed to be built were completed and made fit for habitation to his satisfaction, the lessor and all other necessary parties would effectually grant to the lessee, and the lessee would accept, a lease for thirty-four years from Lady Day, 1886 (less one day), of the premises in *Bond Street*, in consideration of a yearly rent of £182, the lease to contain the covenants by the lessee therein mentioned. The lease was also to contain a covenant by the lessor for the due and punctual renewal of the lease of June, 1881, and for proof to the lessee that the same had been renewed. The agreement stated that *Fanny Farnell* was about, in conjunction with other persons, to apply to the Chancery Division for the confirmation of the agreement, and for the purpose of enabling her or other persons to give a covenant by which the lease to be granted might be extended to the period of forty-two years. And it was agreed that, if she should not obtain from the Court on or before the 18th of July, 1886, an order confirming the agreement, and giving her power to grant the said building lease, the agreement was to be void and of no effect. And it was further agreed that, if she should have or procure power to do so, she should grant to *Hobson* a building lease for the term of thirty-four years (less one day), and give a covenant for extension of the lease to forty-two years, and if such term should be forty-two years the rent to be paid by *Hobson* should be £207. The option as to the term to be granted should be with *Fanny Farnell*, and the lease of such extended term should be, except as to the term and rent, in all other respects identical with the lease thereinbefore agreed to be granted.

The testator's daughter Mrs. *Day* had never had any children.

The petition was presented by *Fanny Farnell* and Mrs. *Walton* and her children, two of whom were the surviving lessees under the lease of 1881, and it asked that the conditional agreement might be confirmed, and that, if necessary, the concurrence of *Briggs* might be dispensed with. He had filed a liquidation petition, and had since left *England* and could not be found. The

NORTH, J. 1886 *In re* FARNELL'S SETTLED ESTATES.

Petitioners also asked that trustees of the will, or at any rate of the settlement of the house, might be appointed.

Wintle, for the Petitioners:—

If necessary I ask that the consent of *Briggs* may be dispensed with. But I submit that the statement in the lease of June, 1881, that the four lessees were "the present trustees," of the will operated as an appointment of them to be trustees, *Briggs*, who had a power to appoint new trustees, being a party to that lease: *Sugden* on Powers (1); *Poulson* v. *Wellington* (2).

[NORTH, J.:—I think that case is a sufficient authority.]

The Court has power to sanction the granting a lease for the residue of the existing term (less one day), with a covenant for the extension of the lease to forty-two years. This will not be a violation of sect. 4 of the Act, which provides that every lease of a settled estate which is authorized by the Court "shall be made to take effect in possession at or within one year next after the making thereof." This lease will take effect in possession at once, and the covenant for extension will make it in effect a lease in equity for a term of forty-two years. Sect. 5 provides that: "Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient, with reference to the special circumstances of the demise." Under that section the Court has power to sanction the proposed covenant.

NORTH, J.:—

I do not see my way to sanction what is asked. The Act says that every lease "shall be made to take effect in possession at or within one year next after the making thereof." I do not see that I have any power to sanction a lease containing a covenant that a new lease shall be granted at the end of thirty-four years, to take effect then. I will sanction a lease for thirty-four years, less one day. It had better be executed by the tenant for life. Under these circumstances it is desirable that the lease should be settled in Chambers.

Solicitor: *James Girdlestone.*

(1) 8th Ed. p. 201. (2) 2 P. Wms. 533.

W. L. C.

MOSS *v.* MALINGS.

NORTH, J.

1886

July 19.

[1885 M. 1099.]

Patent Action—Application at Trial for Amendment of Particulars of Objection.

During the trial of a patent action, after the examination and cross-examination of the Plaintiff had been concluded, the Defendant asked for leave to apply for the postponement of the trial and to amend the particulars of objection, alleging that since the conclusion of the cross-examination he had discovered new facts shewing that the alleged invention was not new at the date of the patent. No affidavit was tendered in support of the application, but the Defendant asked to be allowed to recall the Plaintiff or to go into the box himself to prove the new facts :—

Held, that the application must be refused.

Renard v. *Levinstein* (1) distinguished.

THIS action was brought to restrain an alleged infringement by the Defendant of the Plaintiff's patent for lawn tennis bats. The trial commenced on the 14th of July, and the examination and cross-examination of the Plaintiff were concluded on the 15th of July. The trial was resumed to-day.

Dundas Gardiner, for the Defendant, stated that since the 15th instant the Defendant had discovered some new facts which shewed that the alleged invention was not new at the date of the patent. He asked to be allowed to apply for a postponement of the trial, and to move for leave to amend the Defendant's particulars of objection; also to recall the Plaintiff for further cross-examination, in order to prove the new facts. A similar application was granted in *Renard* v. *Levinstein* (1).

Moulton, Q.C., and *J. C. Graham,* for the Plaintiff:—

The object of requiring the Defendant to a patent action to deliver particulars of objection is to prevent a new case being sprung on the Plaintiff at the trial. The Defendant is at any rate bound to adduce independent evidence of the new facts.

(1) 13 W. R. 229; 11 L. T. (N.S.) 505.

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Dundas Gardiner, in reply:—

There will be no hardship on the Plaintiff if the Defendant is ordered to pay the extra costs. The Defendant is ready to go into the box now to prove the new facts.

North, J.:—

I cannot allow the Plaintiff to be recalled and further cross-examined for the purpose of shewing that the Defendant has a case for amending his particulars of objection. At present there is no evidence before me to justify an application for leave to amend the particulars. In *Renard* v. *Levinstein* (1) the defendant had made a case. *Daw* v. *Eley* (2) is to some extent an authority against the application. But I could only grant it if the Defendant shewed that he could not with reasonable diligence have discovered the new facts sooner. This he has not done. I must, therefore, refuse the application.

Solicitor for Plaintiff: *G. H. Hoyle.*
Solicitor for Defendant: *Hughes.*

W. L. C.

NORTH, J.
1886
July 23.

BAILLIE *v.* GOODWIN & CO.

[1886 B. 3153.]

Practice—Rules of Supreme Court, 1883, *Order* IX., *r.* 6—*Firm—Service of Writ—Place of Business—Agent.*

Defendants were a Scotch firm, having an agent within the jurisdiction whose authority did not extend to taking orders; the name of the firm was affixed to the agent's offices:—

Held, that the offices of the agent were not a place of business of the firm for the purpose of serving the writ.

THIS was an action to restrain the infringement of a patent. The Defendants were a firm of ironfounders carrying on business at *Motherwell* and elsewhere in *Scotland*. The writ was served at

(1) 13 W. R. 229; 11 L. T. (N.S.) 505. (2) Law Rep. 1 Eq. 38.

the offices of *G. N. Macphail*, in *Bucklersbury*, on a clerk of his. This was a motion on the part of the Defendants to set aside the service of the writ, on the ground that the writ was not served personally on any partner of the Defendant firm, and on the ground that they have no place of business within the jurisdiction.

The business relationship between the Defendant firm and *G. N. Macphail* was explained in an affidavit made by *Mathew Dean Goodwin*, a member of the Defendant firm, in the following passages:

"Since the month of July, 1883, my firm have employed as their agent in *London* one *G. N. Macphail*, who carries on business at 20, *Bucklersbury*, *Mansion House*, as agent on behalf of several firms. For the sake of convenience the name of my firm is affixed to the offices rented by Mr. *G. N. Macphail*, and also for convenience my firm's letter-paper is headed as follows: '*London* Offices, 20, *Bucklersbury*, *Mansion House*, *E.C.*'" He denied that they carried on business in any other way within the jurisdiction. "In 1883 my said firm employed *G. N. Macphail* as their agent in *London* to procure for and transmit to them, according to their instructions, specifications and drawings of any publicly advertised work which they proposed to tender for. No fixed terms were agreed upon, but he was paid his outlays and a small fee for his trouble. There was no written agreement. It is merely the duty of the said *G. N. Macphail* to procure for and transmit to my firm such specifications and tracings. He had no authority to take orders for my said firm at the premises of our said agent, situate at 20, *Bucklersbury*, in the city of *London*. My firm do not manufacture, sell, or exhibit any goods, nor is my said firm's business managed or directed by the said *G. N. Macphail*, or by any other person at any other place within the jurisdiction of this honourable Court. The said *G. N. Macphail* acts as agent on behalf of various firms, and so far as my firm are concerned they do not pay or contribute towards the rent of the said premises or towards the general maintenance of the office."

A preliminary objection was taken that the notice of motion did not state the objections intended to be relied on, in pursuance of Order LXX. rule 3.

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Everitt, Q.C., and *Douglas Walker*, for the Defendants:—

A foreign corporation or firm can be sued in this country if they have a place of business of their own here and not a mere agency, and the writ can be served at such place of business: *Newby* v. *Von Oppen* (1). Under the rule applicable to service on a firm, Order IX. rule 6, if no partner is served personally service can only be regularly made at the principal place of business of the firm, within the jurisdiction, on the person having the management of the business at that place. Here the Defendants have no place of business in *England*: *Macphail* is only their agent, he is not their servant, and the business at *Bucklersbury* is his business not theirs. The test of whether the place is the place of business of the firm or not is whether *Macphail* is principal or agent, as was held under the *County Courts Act*, 9 & 10 Vict. c. 95; *Corbett* v. *General Steam Navigation Company* (2). It has also been held that a company does not carry on business at its registered office, but only at a place where there is sale or manufacture: *Keynsham Blue Lias Lime Company* v. *Baker* (3).

Aston, Q.C., and *E. Ford*, for the Plaintiff:—

The Defendants have a place of business at 20, *Bucklersbury*; that place is their office for the purpose of responsibility and for the receipt of orders, that is shewn by their own acts in having their name on the premises and having that address on their note-paper.

NORTH, J.:—

In my opinion the Defendants are entitled to succeed. The question of the validity of the service depends upon Order IX. rule 6, which provides that: "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners"—and that it is admitted has not taken place—"or at the principal place, within the jurisdiction, of the business of the partnership upon any person having

(1) Law Rep. 7 Q. B. 293. (2) 4 H. & N. 482.
(3) 2 H. & C. 729.

at the time of service the control or management of the partnership business there." Now the thing required is that the business of the partnership be carried on at the place where the writ is served. [His Lordship referred to the evidence and proceeded:—] I come to the conclusion that *Macphail* is carrying on a business of his own at No. 20, *Bucklersbury;* he is employed as the agent and not as the servant of the Defendants. And that is the important test, as was pointed out in the case of *Corbett* v. *General Steam Navigation Company* (1). There a company carrying on business in *London* employed in a country town a general commission agent, who transacted the company's business in that town in an office for which the company paid him rent—a circumstance that does not exist in this case. The office was used solely for the company's business, the name of the company was not outside, but there were on a board the words: "*London Steam Wharf,*" which clearly referred to the defendants' business. The question was whether the company carried on business in that town within the meaning of the *County Courts Act*, 9 & 10 Vict. c. 95, s. 128. Chief Baron *Pollock* said: "The question is whether the business was done by the Messrs. *Parker* for the defendants in the character of servants or of agents. There is evidence to shew that Messrs. *Parker* were not the servants of the defendants but their agents only." Baron *Martin* says: "I am also of opinion that Messrs. *Parker* were not the servants of the defendants; there is nothing whatever to shew any relation of master and servant between them. If the argument for the defendants were to prevail, the consequence would be that all large companies who have a number of agents throughout the country would be liable to be sued in every district where their agents reside," and Baron *Channell* says: "The question is not, whether Messrs. *Parker* were the defendants' agents, but whether they were their servants; they clearly were not."

Now in my opinion it is clearly shewn that *Macphail* is not the servant of the Defendants, but is their agent. They are not carrying on business at his office. Two things are said to militate against that view: first, that their name is affixed to his office; and secondly, that their note-paper contains a heading referring

(1) 4 H. & N. 482.

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to his office as their *London* address. Those are no doubt matters that deserve consideration, but they are not sufficient to rebut the evidence before me: that satisfies me that there is an agency but nothing more.

There is another point, even if it were shewn that *Macphail* was carrying on any business of the Defendants, and not acting as their agent: the business, so far as he is connected with it, is a very peculiar business, and I am not satisfied that the clerk on whom the service was made could have the control of that business so as to make service on him sufficient.

A second case cited, *Keynsham Blue Lias Lime Company* v. *Baker* (1), seems very much in point, as it shews that the place of business must be where either manufacture or sale takes place. Here those things take place in *Scotland* and do not take place within the jurisdiction.

I shall set aside service of the writ, but without costs, partly because I think the Defendants have contributed to the mistake by the heading they use for their note-paper, and by having their name on the office of their agent; but chiefly because they have not complied with Order LXX., rule 3, and I am not disposed to say that parties should have costs who have not complied with the rules.

Solicitors for Defendants: *Lyne & Holman.*
Solicitors for Plaintiff: *Wainwright & Baillie.*

(1) 2 H. & C. 729.

D. P.

NORTH, J.

1886

July 28.

DRAKE *v.* GREAVES.

[1868 D. 115.]

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80 [*Revised Ed. Statutes, vol. ix., p.* 646]—*Costs of Re-investment.*

Where a fund representing the price of houses taken for the purpose of a public undertaking had been transferred to the credit of an administration suit *ex parte* the undertakers' account of estates devised by the will, not specifying the special Act or the *Land Clauses Act*:—

Held, that the undertakers were liable to pay costs of re-investment.

THIS was a summons for the re-investment of part of a sum in Court representing the purchase-money of two houses taken by the Metropolitan Board for street improvement, and to have the costs of the re-investment paid by the Metropolitan Board of Works.

The houses formed part of the estate subject to the trusts of the will of *Caroline Guyard* deceased, which was being administered in this suit; they were taken under the *Metropolitan Street Improvements Act*, 1877, which incorporates the *Lands Clauses Consolidation Act*, 1845. The purchase-money for those houses, £2420, was paid into Court by the Metropolitan Board of Works on the 12th of August, 1882, to the credit of "*Ex parte Metropolitan Board of Works*, in the matter of the *Metropolitan Street Improvements Act*, 1877, *Maria Bent* and others the vendors being tenants for life only without power of sale." An order was made in this suit dated the 24th of November, 1882, that the sum of £2420 so paid into Court should after payment of succession duty be invested in consols to the credit of this suit, "*Ex parte Metropolitan Board of Works*, account of estates devised by the will of *Caroline Guyard* deceased."

The summons was taken out by the trustee of the will of *Caroline Guyard*. It was entitled in the suit *Drake* v. *Greaves* (1868 D. 115), and in the matter of the *Metropolitan Streets Improvements Act*, 1877, and in the matter of the *Lands Clauses Consolidation Act*, 1845. It was adjourned into Court on the question of costs.

Cookson, Q.C., and *Simmonds*, for the summons, were stopped.

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Oswald, for the Metropolitan Board of Works :—

Where a fund paid into Court by undertakers has been transferred to an account not bearing the title of the undertakers' special Act, or the *Lands Clauses Consolidation Act*, the jurisdiction to make the undertakers pay costs of a re-investment is gone: *Brown* v. *Fenwick* (1); *Prescott* v. *Wood* (2); *Fisher* v. *Fisher* (3); *Nock* v. *Nock* (4). In the first of these cases the reason of the decision was expressed to be that the title of the special Act not having been retained the jurisdiction was gone; in that case in the order for transfer of the fund to the new account, a direction had been inserted that the fund was not to be taken out of Court without notice to the undertakers; the retention of the name of the Metropolitan Board in the title of the account cannot stand on a different footing from that direction. In the case of *Melling* v. *Bird* (5) Vice-Chancellor *Kindersley* said that a transfer to a fresh account was equivalent to a payment out of Court. In *Prescott* v. *Wood* (6) Vice-Chancellor *Malins* considered that payment into the account of the suit destroyed the jurisdiction to order payment of costs by the *New River Company*.

[The Registrar produced orders in which after funds representing lands taken for a public undertaking had been placed to the credit of accounts *ex parte* the undertakers without naming their special Acts or the *Lands Clauses Act*, the undertakers had been ordered to pay the costs of re-investment.]

Cookson, in reply :—

The course followed in this case with reference to the title of the account was taken simply for the convenience of not having unnecessarily long titles. The object of keeping the undertakers before the Court and of preventing the fund being dealt with behind their back, the only object of retaining the title of the special Act, was equally obtained by keeping the title of the undertakers. In none of the cases cited did it appear that the undertakers' name had been retained; in the case of *Fisher* v. *Fisher* it certainly had not. The presumption is, that if such

(1) 14 W. R. 257.
(2) 37 L. J. (Ch.) 691.
(3) Law Rep. 17 Eq. 340.
(4) W. N. 1879, p. 125.
(5) 17 Jur. 155.
(6) 37 L. J. (Ch.) 691.

a material fact had existed it would have been stated in the reports of the other cases.

NORTH, J.:—

The question is one which seems to me important, inasmuch as the present practice for years past has been to adopt the course adopted in the present case.

The question now is—the title of an account of funds in Court including the words, "*Ex parte* the Metropolitan Board of Works," but not including any such words as, "In the matter of the *Metropolitan Improvements Act*, 1877," or "In the matter of the *Lands Clauses Consolidation Act*, 1845,"—whether the omission of such words from the title of the account is to exclude persons from receiving costs which if those words had not been omitted they clearly would have had a right to receive. Half-a-dozen cases were cited, not one absolutely in point. In some of them it appears the fund had been carried over omitting from the title of the account all reference to the name of the undertakers or to any Act of Parliament. In those cases the fund was put beyond the control of the undertakers, and there could be no power to bring them before the Court and make them pay costs. In two or three cases the report leaves it in doubt whether there was any reference to the undertakers in the account; though I must say that in *Brown* v. *Fenwick* (1) the decision of the Court is put rather on the ground that the title of the Act was not retained, but there is nothing to shew that the undertakers' name was retained.

Now in the present case the name of the Metropolitan Board of Works is put in the account, because they continued interested in the fund. I cannot imagine any other reason. Under these circumstances it seems to me that none of the cases prevent me from deciding that the board are bound to pay the costs of re-investment; of course this application is made in the matter of the *Metropolitan Street Improvements Act*, 1877, and in the matter of the *Lands Clauses Consolidation Act*, 1845. Under those circumstances I think that the retention of the name of the board is

(1) 14 W. R. 257.

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sufficient to preserve their liability to pay the costs of re-investment.

As I have said it has been the practice for many years to draw up orders transferring funds in such cases as the present to accounts without reference to the special Act or the *Lands Clauses Act*, and the Registrar has produced orders for re-investment where, although the funds stood to the credit of accounts which had no reference to any special Act or the *Lands Clauses Acts*, the undertakers have been required to pay the costs of re-investment. In following those orders I shall only adopt what I consider the ordinary practice under the *Lands Clauses Consolidation Act*. And I now direct the Applicants' costs to be paid by the Metropolitan Board of Works, the rest of the summons having been disposed of in Chambers.

Solicitor for the Applicant: *A. C. Cronin.*
Solicitor for Metropolitan Board of Works: *R. Ward.*

D. P.

NORTH, J.
1886
July 29, 30; *Aug.* 2, 3.

In re BOYSE.
CROFTON *v.* CROFTON.

CANONGE'S CLAIM.

[1880 B. 128.]

Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *ss.* 50, 51, *sub-s.* 2, 54, *sub-s.* 2 [*Revised Ed. Statutes, vol. xvi., pp.* 498, 499]—*Bill of Exchange on Demand drawn Abroad—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3 [*Revised Ed. Statutes vol. i., p.* 705]—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, *sub-s.* 3, 45, *sub-s.* 2, 46, *sub-s.* 2 (*c*), 72, *sub-ss.* 1, 1 (*b*).

Sect. 51, sub-s. 2, of the *Stamp Act*, 1870, includes bills payable on demand. Therefore a bill drawn in *France* on the *Bank of England* was properly stamped by the holder affixing to it and cancelling a penny adhesive stamp.

In 1872, *B.* drew a bill of exchange at sight to her own order; she lived from that time to her death in 1878 at *Marseilles* with *G.* as his wife; she indorsed the bill to *G.* In 1876, *G.* indorsed it to *C.* The bill was presented for payment in 1880:—

Held, that time did not begin to run for the purpose of barring the right of action on the bill till presentation.

A bill of exchange was drawn on the *Bank of England* for £7000, "which sum is on account on the dividends and interest due on the capital and

deeds registered in the books of the" bank in the names of *C.* and *B.*, "which you will please charge to my account and credit according to a registered letter I have addressed to you:"—

Held, that the bill was negotiable.

The bill was drawn by *B.* in 1872. She had no account with the *Bank of England*; she had Government securities on which large dividends were due; the bill was presented for payment in 1880, after her death:—

Held, that the delay in presentment did not release her estate, as she had no reason when she drew the bill to believe that the bill would be paid if presented.

JUDGMENT was pronounced in this action on the 27th of February, 1880, for the administration of the estate of *Jane Stratford Boyse*, widow. She died on the 4th of May, 1878, intestate, at *Marseilles*, domiciled in the *United Kingdom*. The Plaintiff in the action was one of the next-of-kin of the intestate; the Defendant was her administrator.

This was a claim by *Phillipe Canonge*, of *Marseilles*, to prove on a document as a bill of exchange drawn by the intestate in 1872 in the following form:—

"August 16th August, 1872.

"At sight, *Marseilles*. Good for £7000.

"By this single and present letter of exchange please pay to my order the sum of £7000 sterling, which sum is on account on the dividends and interests due on the capital and dividends registered in the books of the Governor and the *Bank of England* and Company in the name of *Colclough* and *Boyse*, which you will please charge to my account and credit according to a registered letter I have addressed to you.

"*Jane Stratford Boyse.*"

This document was addressed to the *Bank of England.*

The intestate did send a registered letter, dated the 16th of August, 1872, to the Governor and Directors of the *Bank of England* in the following terms:—

"Gentlemen,—I have the honour to give you notice that I have given an order on the *Bank of England* for the sum of £7000 to pay on my order on the money and interest lodged in your bank. I request you also to send me an account of all my property in the Bank enclosed in a registered letter addressed to my address."

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At that time Mrs. *Boyse* was a widow, having survived her second husband; she was then living and continued to live down to her death at *Marseilles* with one *Auguste Michel Gautier*, as Madame *Gautier*, and passed as his wife. She never had an account at the *Bank of England*. She had other bankers in *London*, but she was possessed of a large amount of British Government securities, which she had derived from her first husband, *Cæsar Colclough*. At that time the *Bank of England* refused to pay the dividends of her Government securities without a declaration that she was not married to *Gautier*, and she refused to make such declaration.

Mrs. *Boyse*, in April, 1873, indorsed the document on which proof was sought in the following form:—

"Pay to the order of Mr. *Gautier*, value in cash.

"*Marseilles*, 21st April, 1873.

"*Jane Stratford Boyse*."

In August, 1876, *Gautier* indorsed it to the claimant in the following form:—

"*Payez à l'ordre de M. Canonge père value en compte pour advance diverses de ses clients.*

"*Marseille, le* 10 *Août*, 1876.

"*A. Gautier*."

In February, 1880, the document was presented for payment to the *Bank of England* on behalf of the claimant by a notary, who had affixed to it and cancelled a penny adhesive stamp. Payment was refused, and the words "no account" written across the face of the document.

The *Statute of Limitations*, 21 Jac. 1, c. 16, s. 3, was set up as a defence to the claim.

Evidence was adduced on the part of the claimant to shew that any formalities necessary as to the indorsements had been duly observed. Evidence to the contrary was adduced on the part of the administrator, the person who contested the claim.

Napier Higgins, Q.C., for the administrator:—

There is a preliminary objection to the claim, because the document on which proof is sought is not duly stamped. The

Stamp Act, 1870, s. 50, provides that the penny adhesive stamp which may be affixed to a bill payable on demand is to be cancelled by the drawer before he delivers it out of his hands. In case that is not done sect. 54, sub-sect. 2, allows the acceptor or payee to attach and cancel the stamp. Those are the only two ways in which the adhesive stamp on a bill payable on demand can be legally cancelled.

Cookson, Q.C., for the Claimant:—

An additional mode of affixing and cancelling stamps on all bills drawn abroad is provided by sect. 51, sub-sect. 2, of that Act, namely, the mode adopted in this case, by the holder before presentment in this country affixing and cancelling the stamp. It is not even necessary that the stamp should be affixed before presentation: *Sharples* v. *Rickard* (1); *Griffin* v. *Weatherby* (2). In *Viale* v. *Michael* (3) it was said that the stamp need not be affixed before trial.

Napier Higgins, in reply:—

The provision of sect. 54, sub-sect. 2, only applies to *ad valorem* duties. "Such bills" in that sub-section refers to the bills stated before, which are, on the natural construction of the clause, only bills subject to *ad valorem* duty.

NORTH, J.:—

I will dispose of this point about the stamps at once. The point is simply this. There is a bill for £7000, which, for the purpose of dealing with the stamp, I must assume to be a perfectly good *bonâ fide* bill in every way, recoverable as a matter of course if properly stamped. It is said it is not properly stamped because the stamp it bears of one penny is not duly affixed and cancelled. It seems to me it is, and for this reason. The bill is a foreign bill. It is a bill drawn abroad on the *Bank of England* here. The question is, what stamp it ought to bear. The stamp is one which was not affixed at the time it was drawn, in 1872,

(1) 2 H. & N. 57. (2) Law Rep. 3 Q. B. 753.
(3) 30 L. T. (N.S.) 463.

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but was only put on it on the 2nd of February, 1880, when, as it appears to me, for the first time, there is any evidence that the bill was dealt with in any way (I use that term generally) in *England*. The stamp is, as I have said, not an impressed stamp, but an adhesive stamp. Is the stamp right? I think so, for this reason. First of all the Act says that all duties payable under the Act are to be denoted by impressed stamps only, except where express provision is made to the contrary. This is not an impressed stamp. Is there any express provision making it the proper stamp? If one looks at sect. 50 what appears is this: "The fixed duty of one penny on a bill of exchange for the payment of money on demand may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power." Now that appears to me to apply to all bills of exchange for payment of money on demand, whether they are English bills or foreign bills. It is not limited in any way, but applies to one quite as much as the other. The 51st section is: "The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the *United Kingdom* are to be denoted by adhesive stamps." Now this is a bill of exchange drawn out of the *United Kingdom* and there an adhesive stamp would do. But the duty referred to there is the *ad valorem* duty, and it is said that that does not refer to the fixed duty of one penny on a bill of exchange. That may be perfectly sound criticism, but then the next sub-section of sect. 51 seems to me not to be confined to bills of exchange and promissory notes bearing an *ad valorem* duty. It runs thus: "Every person into whose hands any such bill or note comes in the *United Kingdom*" —now what is "such bill or note"? It is a bill of exchange or promissory note drawn or made out of the *United Kingdom;* and reading those words in the 1st sub-section of sect. 51 into the 2nd sub-section it reads thus: "Every person into whose hands any bill of exchange or promissory note drawn or made out of the *United Kingdom* comes in the *United Kingdom* before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays such bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient

amount, and cancel every stamp so affixed thereto." That seems to me to apply to a foreign bill coming into the *United Kingdom* before it is stamped, and enables it to be stamped then by the person about to present it for payment, or the person indorsing, transferring, or in any manner negotiating or paying such bill or note, and it provides that he is to cancel the stamp so affixed. That seems to me precisely what was done in the present case; because, according to the evidence, on the 2nd of February, 1880, immediately before presentation for payment at the *Bank of England*, the person who held the bill for the purpose of presenting it for payment did affix a penny stamp to it, which is the proper amount, and which if affixed by Mrs. *Boyse* originally would beyond all question have made the bill a good bill. Under those circumstances it seems to me the stamp is right.

Cookson, Q.C., *Butcher*, and *F. M. Abrahams*, for the claim:—

The *Statute of Limitations*, 21 Jac. 1, c. 16, s. 3, is no defence, for by virtue of 4 Anne, c. 16, s. 19, time never began to run during the lifetime of Mrs. *Boyse*, for she was always beyond the seas: *Byles* on Bills (1). Time did not begin to run till there was a person that could be sued in this country, that is to say, till the Defendant was constituted Mrs. *Boyse's* legal personal representative in this country. Secondly, time did not begin to run till a right of action arose against Mrs. *Boyse* or her estate. There was no right of action till the bill was presented: *Byles* on Bills (2); *Holmes* v. *Kerrison* (3). The negotiability of the instrument is not destroyed, because the drawer has pointed out on the face of the instrument the fund out of which she intended the payees to be recouped: *Byles* on Bills (4); *Macleed* v. *Snee* (5); *Bills of Exchange Act*, 1882, s. 3, sub-s. 3 (*a*). That Act being a codification of existing law, though it was passed after this bill was drawn, shews the law applicable to the bill: *M'Lean* v. *Clydesdale Banking Company* (6).

Though there was great delay in presentation, the drawer was not released by such delay, because the drawees were not bound

(1) 14th Ed. pp. 362, 363.
(2) 14th Ed. p. 358.
(3) 2 Taunt. 323.
(4) 14th Ed. p. 108.
(5) 2 Str. 762.
(6) 9 App. Cas. 95.

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to pay the bill, and she had no reason to believe that it would be paid if presented: *Bills of Exchange Act*, 1882, s. 46, sub-s. 2 (*c*).

The bill is an English bill, at least, for the purpose of enforcing payment in this country: *Bills of Exchange Act*, 1882, s. 72, sub-s. 1, proviso (*b*).

Napier Higgins, Q.C., and *Hadley*, for the administrator:—

The period at which time begins to run, for the purpose of barring the remedy on a bill of exchange, is the date of its being drawn, not the date of its being presented, for presentation for payment is not a condition precedent to the drawer's liability: *Byles* on Bills (1); *Megginson* v. *Harper* (2).

In a case like this, where the holders were living in the same town as the drawer and could have sued her there, the provision in 4 Anne, c. 16, s. 19, does not apply. In *Pardo* v. *Bingham* (3), a case decided on the 10th section of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), Lord *Hatherley* seems to have taken this view.

The document in respect of which the claim is made is not negotiable: because, on a fair construction of its words, it amounts to an order to pay out of a particular fund, and incorporates into itself a letter of concurrent date to the *Bank of England*: *Jenney* v. *Herle* (4); *Yeates* v. *Groves* (5); *Byles* on Bills (6); *Bills of Exchange Act*, 1882, s. 3, sub-s. 3.

The holder has lost his right against the drawer's estate by not presenting in a reasonable time: *Bills of Exchange Act*, 1882, s. 45, sub-s. 2. Mrs. *Boyse* drew against property she was entitled to. And the law contained in sect. 46, sub-sect. 2 (*c*), of the *Bills of Exchange Act*, 1882, applies, as we submit, only to a person who knowingly draws on a payee he has no reason to think will pay; therefore it does not affect this case.

The bill was a French bill and required French formalities, except so far as it was dealt with in *England*: *Bills of Exchange Act*, 1882, s. 72, sub-s. 1; the evidence shews that such formalities were not complied with.

(1) 14th Ed. p. 358.
(2) 2 Cr. & M. 322.
(3) Law Rep. 4 Ch. 735.
(4) 2 Lord Raym. 1361.
(5) 1 Ves. 280.
(6) 14th Ed. p. 107.

On the merits the claim must fail, for there was no consideration given by *Gautier*, and *Canonge* took under such circumstances that he holds subject to the equities that affected *Gautier*: *Jones* v. *Gordon* (1); *Macdonald* v. *Whitfield* (2); *Dettmar* v. *Metropolitan and Provincial Bank* (3).

Cookson, replied on the merits:—

Canonge as a *bonâ fide* holder for value is entitled to proof: *Mills* v. *Barber* (4).

NORTH, J.:—

In answer to this claim, several defences have been set up. First, it was said the stamp was insufficient; but that point I have already disposed of. In the next place, it was said the document in question is not a bill of exchange at all. Now, as regards that, one must remember this, that Mrs. *Boyse* not having been married to *Gautier*, her domicil was not changed, and remained English, or Irish. The bill of exchange is drawn by an Englishwoman in English upon the *Bank of England*, who are, of course, English payers; and it seems to me, looking at that, the bill was intended by her to operate as an English bill.

Then it is said that it is not good as an English bill by reason of certain matters connected with it. Now the bill runs thus:—[His Lordship read the bill as set out above.] Now if I take the earlier part of this bill only, it is clear it would be a good bill. But then there are two things suggested with respect to it. First of all, it is said it is an order to pay out of a particular fund, and for that reason it is not a bill of exchange. As regards that, the authority relied on is a passage in *Byles* on Bills (5), and of course the authorities cited in support of the proposition in the text. For convenience I will read from the text, and it runs thus:—"Upon the same principle the bill or note must not be made payable out of a particular fund, for the fund may prove insufficient;" and then two or three instances are given. But then the text proceeds (6):—"But the statement of

(1) 2 App. Cas. 616.
(2) 8 App. Cas. 733.
(3) 1 H. & M. 641.
(4) 1 M. & W. 425.
(5) 14th Ed. p. 107.
(6) Ibid. 108.

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a particular fund in a bill of exchange will not vitiate it if introduced merely as a direction to the drawee how to reimburse himself . . . thus, a bill directing the drawee to pay *J. S.* £9 10*s.* 'as my quarterly half-pay,' was held to be a good bill." In connection with that, it is convenient to refer to the *Bills of Exchange Act*, 1882, and I do that because, although the bill is dated in 1872, ten years before that Act passed, it is clear that Act was, in bulk at any rate, and, so far as it bears on what I have to deal with to-day, merely a consolidation and a re-enactment of the existing law; and with respect to that I may refer to the observations of Lord *Blackburn* in *M'Lean* v. *Clydesdale Banking Company* (1): "I do not think that the *Bills of Exchange Act* applies to this case, for it did not receive the royal assent until some months after the cheque had been issued; but I do think that the enactments in that Act are very good evidence of what had been the general understanding before it was passed, and of what was the law upon the subject." Now, looking at sect. 3, to which he went on to refer, it provides this:—"(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer. (2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange." Then follow these words:—"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional"—that is to say, it does not prevent the bill being unconditional. It seems to me that the words in the bill to which I have referred come precisely within that, and that it is merely a statement on the face of the bill of exchange what the fund is out of which the drawee is to reimburse himself, and what is the account to be debited with the amount.

(1) 9 App. Cas. 105.

Then another objection is raised with respect to it, which is this. It is said that the bill of exchange incorporates other things. I have already read the words of the section, which says that an instrument which orders any act to be done in addition to the payment of money is not a bill of exchange. What is said is, that the latter words of the bill of exchange not only direct it to be on account of the dividends, but go on to say: "which you will please charge to my account and credit according to a registered letter I have addressed to you." If it was: "which you will please charge to my account and credit," it is obvious that would not prevent it being a bill of exchange; but then it is said that the registered letter makes a difference. I have the registered letter here, and I do not think the registered letter makes the slightest difference. In the first place, in my opinion, the terms of the letter are not incorporated in the bill at all. What it says is, charge my account and credit as mentioned in a registered letter. But it does not say according to the conditions mentioned in the registered letter, but not mentioned here; but merely charge my account and credit according to a registered letter. The letter runs thus: "I have the honour to give you notice that I have given an order on the Bank of *England* for the sum of £7000 to pay on my order on the money and interests lodged in your Bank." That seems to me what is referred to in the bill of exchange, and it does not carry it in the slightest degree further. But then the letter says this also: "I request you also to send me an account of all my property in the Bank enclosed in a registered letter addressed to my address." That is not part of the bill of exchange, and in my opinion is not in any way incorporated into the bill of exchange by the reference to the registered letter contained in the bill, and, in my opinion, the other things which are said to be incorporated are not incorporated at all.

The next point raised is this: It is said that this is not an English bill of exchange at all, but a French bill of exchange, and with respect to that the 72nd section of the Act of 1882 is not immaterial. That says: "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determinable as follows:

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(1.) The validity of a bill as regards requisites in form is determinable by the law of the place of issue," (that is to say, in the present instance, *Marseilles*) "and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made." Of these indorsements on the back of the bill the first does not shew where it was made, but the second does. The second is dated, "*Marseilles*, 10th of August, 1876," but as regards the first, inasmuch as it is proved that *Gautier* and Mrs. *Boyse* were resident at *Marseilles*, and never came to this country, I take for granted that the first indorsement was at *Marseilles* as well as the second. Then there are certain provisions upon that sub-section, the first of which I need not read. The second is this: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the *United Kingdom*. (3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured." It is said that under that the indorsements at any rate are to be determined by French law. Then the question is, whether if the effect of those indorsements is to be governed by French law they are good or bad. Upon that point the question is one of fact, and I can only act on the opinions given by those who have acquaintance with the French law, which is in *England* a question of fact. As to that I have contradictory statements. If I had to decide, I should on the affidavits come to the conclusion that it is a good French bill, but in my opinion it is not necessary to decide that.

Another point was raised with respect to the *Statute of Limitations;* and the statutes of *James* I. and of Queen *Anne* and 19 & 20 Vict. c. 97, s. 10, were somewhat fully commented on. But they seem to me immaterial, and not to bear on this point. This is a

claim made against the estate of the drawer of the bill. The liability of the drawer of a bill is to pay it if the acceptor does not pay, and the liability on the part of the drawer does not arise, and there could be no action against the drawer, until what was necessary against the acceptor had been done—that is to say you could not sue the drawer for non-payment until the bill had been presented for payment. That presentation for payment did not take place until February, 1880, and it appears to me that if the statute applies at all, it could only run from that date, because there was no liability on the part of the drawer until that time. Therefore, as far as the *Statute of Limitations* goes it seems to me that is no defence.

The interval of eight years may be a ground of defence in a different way, but it does not in my opinion rest or depend in any way upon the *Statute of Limitations*.

Then it is said that the liability is gone by reason of the omission to present the bill for payment within reasonable time; and what is relied upon is this, the 45th section in the same code of law, as I may call it, the statute of 1882, provides that: "Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged. A bill is duly presented for payment which is presented in accordance with the following rules: (1) where the bill is not payable on demand, presentment must be made on the day it falls due; (2) where the bill is payable on demand," and for this purpose a bill payable at sight is equivalent to a bill payable on demand under another section of the Act: "then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable." The 46th section provides that delay in making presentment for payment is excused under certain circumstances, and sub-sect. 2 says "presentment for payment is dispensed with, where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected," and then follows this clause: "The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment . . . . As regards

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the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." Under the present circumstances it appears to me quite clear that the drawees were not bound as between themselves and the drawer to accept or pay the bill. It is clear that the drawer had no account with the Bank, and her idea that these dividends upon the Government funds would be assets in the Bank available for payment of a bill drawn on them, was, of course, untenable. As matter of fact there were no grounds as between the drawer and drawees to say that non-presentment would in itself have discharged the drawer under these circumstances by force of the law corresponding with the provisions of those sections which was in existence before the Act was passed.

[His Lordship decided that the bill was not given for value to *Gautier*, and that *Canonge*, the claimant, took from *Gautier* under such circumstances that he was bound by the equities between *Gautier* and the estate of Mrs. *Boyse*, and refused the claim with costs.]

Solicitors for Claimant: *Michael Abrahams & Co.*
Solicitors for Administrator: *Gregory, Rowcliffes, & Co.*

D. P.

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April 8 *to* 21; *May* 4, 5, 6, 10; *Aug.* 12.

BATTHYANY *v.* WALFORD.

[1883 B. 2623.]

Foreign Law—Tenant for Life—Waste—Ex Contractu—Liability in this Country—Administration Action.

The possessor of a foreign entailed estate died domiciled in and left property in *England*.

By the law of the foreign country the possessor of an entail is liable for deterioriation whether voluntary or permissive, and entitled to compensation for improvements. After his death the liability and the compensation can be enforced in accordance with a special procedure code as between the representatives of the late possessor's general estate and the successor as representing the entailed estate.

The successor brought a creditor's administration action in *England* against the English executor, in which it was admitted that some acts of

waste had been committed and also some improvements executed by the late possessor, but the particulars were not proved :—

Held, that the Plaintiff was entitled to an administration judgment and to prove in respect of the alleged permissive as well as voluntary deteriorations, but that the amount of his claim must be subject to a deduction for the value of improvements, and must first be determined in the Courts of the foreign country.

The objection that the claim was analogous to a claim for waste in *England* and could not be made the ground of an English judgment against the executor except so far, if at all, as it fell within the statute 3 & 4 Will. 4, c. 42, s. 2, held not to apply, because the deteriorations ought to be regarded not as torts like waste, but as breaches of a condition or contractual obligation subject to which the estate was held.

THIS was an action by Prince *Edmund Batthyany*, the present possessor of very large settled estates in *Austria* and *Hungary*, for the administration of the estate of his deceased father Prince *Gustav Batthyany*, who was a naturalised and domiciled Englishman, and died in 1883 leaving both real estate and personal estate in *England*. The real estate was devised to trustees, and Mrs. *A. Smith* was appointed executrix and residuary legatee. The estates in *Austria* and *Hungary* were the subjects of certain settlements called "*Fidei-commisse*," somewhat analogous to entails in England. The late Prince *Gustav Batthyany* had on the death of his predecessor made declaration as required by the law of his intention to take possession as heir or successor to the entails, and entered and remained in possession as usufructuary during his life. As such he was according to the laws of these countries liable for deterioration in the nature of waste whether voluntary or permissive, and was entitled to compensation for ameliorations or improvements, and was, as the Plaintiff alleged, bound to keep the estates as far as possible in the state and condition in which he received them. Elaborate provisions on the subject are made by the laws of those countries, and in particular by special procedure codes, by means of which the amounts of such deteriorations and ameliorations are ascertained, as between the successors to the entail and the allodial heirs or persons entitled to the general estate of the deceased possessor, and payment enforced accordingly. Some of the preliminary steps for ascertaining these amounts had been taken by Prince *Edmund Batthyany* both in *Austria* and *Hungary*. The executrix had also

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admitted in this action certain specific liabilities, and had submitted to accounts being taken to ascertain their amount, and she so far admitted assets. Besides this, questions were raised under the laws of *Austria* and *Hungary*, as to the nature and extent of the claims which would be valid for deteriorations or ameliorations. On these questions the evidence of foreign lawyers on both sides was taken in Court. His Lordship, however, came to the conclusion that the rights of the parties must be decided in the Courts of *Austria* and *Hungary*, and that it would be useless and presumptuous for him to express any opinion as to their law by way of guidance to those Courts.

The facts of the case are further stated in the judgment of the Court.

Barber, Q.C., *Ingle Joyce*, and *G. T. Millar*, for the Plaintiff:—

It is no objection to this suit that it relates to real estate in another country: *Carteret* v. *Petty* (1), as the decree of this Court is only *in personam*, and this is a mere money demand. *Ewing* v. *Orr-Ewing* (2) was a much stronger case. The late Prince, on coming into possession, must be held to have entered into a sort of contract to keep up the estate according to the conditions prescribed by the law, and became bound to fulfil the conditions: *Gregg* v. *Coates* (3) and *Rees* v. *Engelback* (4).

Warmington, Q.C., and *Buckley*, for the trustee of the real estate.

Hemming, Q.C., *Ince*, Q.C., and *Hadley*, for the executrix:—

The Plaintiff has not proved himself a creditor and cannot have administration: *King* v. *Malcott* (5); *Dodson* v. *Sammell* (6).

The foreign proceedings are only steps preliminary to an action not yet commenced.

Even if there were a final judgment in *Austria* it could not be looked at because Mrs. *Smith* has never appeared or become

(1) 2 Sw. 323, n.
(2) 9 App. Cas. 34; 10 App. Cas. 453.
(3) 23 Beav. 33.
(4) Law Rep. 12 Eq. 225.
(5) 9 Hare, 692.
(6) 1 Dr. & Sm. 575.

subject to the jurisdiction: *Schibsby* v. *Westenholz* (1); *Buchanan* v. *Rucker* (2); *Rousillon* v. *Rousillon* (3).

The procedure in *Austria* and *Hungary* cannot be regarded, because all matters of procedure are governed by the *lex fori*: *Leroux* v. *Brown* (4); *Bain* v. *Whitehaven and Furness Railway Company* (5).

There can be no relief here for a foreign wrong unless it is one which would be actionable both by the foreign and the English law: *Phillips* v. *Eyre* (6). Admitting the fact of waste in *Austria* and in *Hungary*, and that the laws of those countries give remedies in respect of it against executors, this Court can only apply the English remedy, and there is no English remedy at all for permissive waste: *Countess of Shrewsbury's Case* (7); *Gibson* v. *Wells* (8); *Warren* v. *Rudall* (9); *Powys* v. *Blagrave* (10); and no English remedy even for voluntary waste except to the limited extent allowed by 3 & 4 Will. 4, c. 42, sect. 2—*i. e.* for voluntary waste committed within six months before the death—and this is not even alleged. We may even go further, and say that, waste being a tort, no action lies in *England* for waste to foreign land. *Carteret* v. *Petty* (11), which was cited to shew that an action would lie in *England* for waste in *Ireland*, was not a suit for waste at all (which would be tort) but a suit for an account of the proceeds of the wasted timber as for money had and received, waiving the tort. This is clear from a comparison with *Cartwright* v. *Pettus* (obviously the same case) (12). The other cases cited against us are either beside the question or, as *In re Hawthorne* (13), in our favour. Ours is not the case of a gift coupled with a condition. [They also cited *Story's* Conflict of Laws (14); *De la Vega* v. *Vianna* (15); *The Halley* (16); *Bullock* v. *Caird* (17).]

(1) Law Rep. 6 Q. B. 155.
(2) 9 East, 192.
(3) 14 Ch. D. 351.
(4) 12 C. B. 801.
(5) 3 H. L. C. 1, 19.
(6) Law Rep. 6 Q. B. 1.
(7) 5 Rep. 13a.
(8) 1 B. & P. (N.R.) 290.
(9) 1 J. & H. 1.
(10) 4 D. M. & G. 448.
(11) 2 Sw. 323, n.
(12) 2 Cas. in Ch. 214.
(13) 23 Ch. D. 743.
(14) 7th Ed. §§ 556, 591, 607.
(15) 1 B. & Ad. 284.
(16) Law Rep. 2 P. C. 193.
(17) Ibid. 10 Q. B. 276.

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Barber, in reply:—

The claim in this action is not for a tort abroad or in relation to land abroad, but to enforce against the estate of a testator in this country a liability incurred by him abroad. He took the property subject to the liabilities, and on an implied contract. He was not bound to take the property, but as he did take it, he must fulfil the conditions. Even if the analogy to an action for waste prevails, the six months' rule does not always apply to a case of permissive waste: *Woodhouse* v. *Walker* (1). This is a mere money demand: *Messenger* v. *Andrews* (2). It is not an action for waste, as no such action is recognised by the Austrian law.

Hemming, in reply, on *Woodhouse* v. *Walker*:—

There the burden of repairing was imposed by the express terms of the devise, and the judgment expressly recognises the general rule in the absence of such express condition. Here the non-repair is sued on, just like waste in *England*, on the ground that an obligation to repair is imposed by the general law. There is nothing like contract or condition.

1886 Aug. 12. NORTH, J. (after stating the facts of the case and referring to the various proceedings which had taken place in the Courts of *Austria* and *Hungary* and the proceedings in this action, including the submission to account, as above mentioned, continued):—

The remaining questions arise out of the claim of the Plaintiff to prove against the estate of the late Prince in respect of the other deteriorations (to use a generic word which the parties have adopted) in the entailed estates during the time of the late Prince; to which the Defendant, the executrix, answers: 1. That there is not any such deterioration proved; 2. That if there is it cannot be made the subject of proof against the estate of the late Prince in this country; 3. That if any such proof can be made here it can be only in respect of deteriorations within six months before the death of the late Prince; 4. That as against any claim

(1) 5 Q. B. D. 404. (2) 4 Russ. 478.

which can be made the Defendant is entitled to set off the value of improvements or ameliorations to a larger amount effected by the late Prince on the estates in question.

[His Lordship then said that the Defendant had objected to his original suggestion that the Plaintiff should establish his claim in the Courts of *Austria* and *Hungary*, and then prove here for the amount.] I have therefore to consider whether the contention on the part of the Defendant that the claim of the Plaintiff in respect of deteriorations is invalid according to the law of *England* and cannot be the subject of proof in this country is maintainable to any and what extent.

Upon the question whether there has been any deterioration I have no doubt that there has. [His Lordship then stated certain particulars as shewing deteriorations to a large amount.] I do not understand that the amount has been finally settled. It may be that when further proceedings are taken the effect of what has been done may be displaced; or it may be that other claims *per contra* in respect of ameliorations may be established by the executrix to an amount exceeding the claims against the estate which she represents. But it is admitted that this has not yet been made out, and the evidence of Mr. *Koszits* (one of the foreign experts) that when the inventories of deteriorations and improvements have been completely made out the Defendant will, in his opinion, have a balance to receive and not to pay, amounts to an admission that unless the claims for improvements are substantiated there will be something payable to the Plaintiff. I hold, therefore, that a *primâ facie* liability of the Defendant in respect of deteriorations is sufficiently established to justify further inquiry on the subject, under which the details and amount can be ascertained. I hold further, that, independently of this, the admissions of liability to account are sufficient to entitle the Plaintiff to such inquiry.

Any such inquiry would, however, be useless if, even though the fact of deteriorations were so ascertained, no relief in respect thereof could be given by this Court. This contention is founded upon the proposition that no claim can be maintained in this country unless the act or default giving rise to it, whether *ex contractu* or *ex delicto*, is one which would give a right of action

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both by the law of the country where such act or default took place, and also by the law of this country: see *Phillips* v. *Eyre* (1); that the acts or omissions which occasioned the deteriorations are in any case merely acts of waste, and therefore torts as to real estate in respect of which no action can be brought in this country; that even if a subject of action arose at all it can only be so far as the matters complained of, if they had occurred in this country, would have been the subject of action against executors here, viz., that only such deteriorations can be made the subject of claim as had occurred within six months before the death of the late Prince; and further that, according to the *Countess of Shrewsbury's Case* (2) the claim must be confined to acts of voluntary as distinguished from permissive waste.

These contentions on the part of Mrs. *Smith* seem to me beside the mark. It is proved to my satisfaction to be the law of both *Austria* and *Hungary* that when a person succeeding to the possession of property the subject of a *fidei-commiss* comes to the Court which has jurisdiction over the entail, and proves the death of his predecessor, and his declaration that he takes possession of the estate is accepted by the Court, he enters upon the estate upon the condition and subject to a contractual obligation of observing the fundamental principle upon which possessors held the entailed estates, upon the non-observance of which the Court will interfere. [His Lordship then referred to the Austrian and Hungarian Codes.] It seems to me, therefore, that he holds possession of the estates upon the express condition of observing the fundamental principle above referred to, and that such a liability to perform a condition, even to the extent of not allowing permissive waste, is one which is well established as recognisable by the law of this country: *Messenger* v. *Andrews* (3); *In re Skingley* (4); *Gregg* v. *Coates* (5); *Rees* v. *Engelback* (6); *Woodhouse* v. *Walker* (7).

As this obligation of the possessor is to keep the property in the state in which he received it, the obligation was continuing,

(1) Law Rep. 6 Q. B. 1.
(2) 5 Rep. 13a.
(3) 4 Russ. 478.
(4) 3 Mac. & G. 221.
(5) 23 Beav. 33.
(6) Law Rep. 12 Eq. 225.
(7) 5 Q. B. D. 404.

and the liability would according to English law arise in respect of all deteriorations existing within six months of the death of the late Prince, whether they first arose within that period or not: *Woodhouse* v. *Walker* (1).

It appears to me, therefore, that the proper course is to allow the Plaintiff to establish the amount of his claim against the estate of the late Prince by the proper proceedings in the Courts of *Austria* and *Hungary*, and to allow him to come in as a creditor here in respect of the amount to which he shall establish his right.

Solicitors for Plaintiff: *Ashurst, Morris, Crisp & Co.*
Solicitors for trustees of the real estate: *Walfords.*
Solicitors for Executrix: *Tyrrell Lewis & Co.*

(1) 5 Q. B. D. 404.

C. M.

STIRLING, J.

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May 27, 28; *July* 3.

MIDLAND RAILWAY COMPANY *v.* MILES.

[1885 M. 2303.]

Railways Clauses Act, 1845, *ss.* 79, 80, 81 [*Revised Ed. Statutes, vol. ix., p.* 727] —*Minerals—Owner of adjoining Land—Way of Necessity—Communication—Crossing Railway—Open Workings.*

A railway company under the powers of a special Act and of the *Railways Clauses Act*, 1845, bought a piece of land on part of which they made three railways leaving the rest of the land within the triangle formed by the railways, except two small pieces on the west of their lines. The landowner from whom they bought owned the adjoining land on the east. This he afterwards sold, but acquired a right of way over it. He had also bought the two severed pieces on the west. The conveyances to the railway company did not include the minerals under the land.

Held, that as under the special Act and under sect. 80 of the *Railways Clauses Act*, the landowner when he sold the land was entitled to make passages under the railway from his land on the east, no right of way over the railway for the purpose of working the minerals would be implied, and that he had not now such right of way:

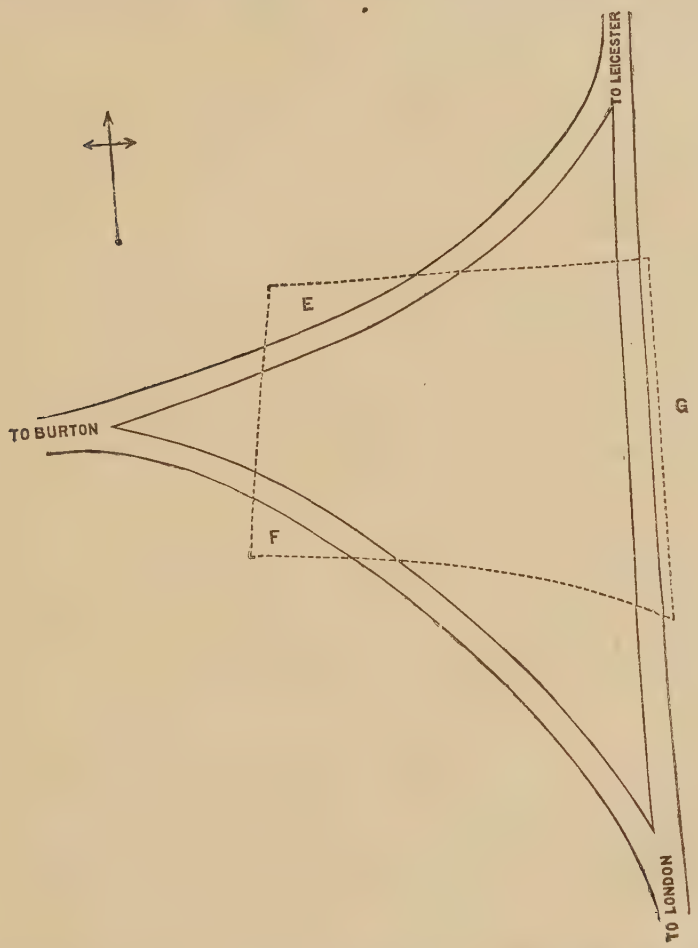
Held, that being neither "owner, lessee, or occupier" of the land to the east, he had no right, under sect. 79 of the *Railways Clauses Act*, to work the minerals on the land within the triangle by means of passages under the railway; but he might work the minerals from the pieces of land on the west, and under sect. 81 get compensation for extra expenses.

Held, that under sect. 79 of the *Railways Clauses Act* the owner of the minerals might, having lawfully made a communication with the land sold to the railway company, work the minerals by open workings, that being the usual mode of working such minerals in the district where the same were situate.

THE *Midland Counties Railway Company*, which afterwards became the *Midland Railway Company*, had in 1837 and 1850 purchased from the predecessor in title of *W. F. Miles* the quadrangular piece of land marked in the plan (1) by dotted lines, and adjoining other land of the vendor marked G on the plan. On the piece of land so purchased the railway company made the lines of railway shewn in the plan inclosing in a triangular space the rest of the land so purchased, with the exception of two small pieces marked E and F. The predecessor in title of *Miles* afterwards sold the land marked G to one *Clarkson*, who used it as a

(1) This plan should be substituted for that at 30 Ch. D. 635.

brickfield. *Miles* afterwards bought from the railway company the pieces of land E and F. The conveyances to the railway company did not include minerals, but the railway company had subsequently bought the minerals under their lines of railway. *Miles*, who had obtained from *Clarkson* a right of way over G, now claimed a right for the purpose of working the clay on the land



within the triangle to cross the railway from G into the land within the triangle. The railway company brought these two actions to restrain him. Another question raised on the hearing was whether the clay could be worked by open pits.

The facts of the case are fully stated in the judgment of the

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Court. The Solicitor-General opened the first action only, but in the course of the argument it was agreed that both actions should be tried.

Sir *H. Davey*, S.G., *P. Beale*, and *A. Gray*, for the Plaintiffs:—

The company does not on this hearing argue that clay is not a mineral within the meaning of the Acts, as held in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1). A mere reservation of minerals in a conveyance does not give a general right of way over the surface of the land to get the minerals, and in this case the whole thing is provided for by the Acts, and no rights could be reserved inconsistent with the working of the railway. In *Mulliner* v *Midland Railway Company* (2) such a reservation was held to be *ultrà vires*. The Defendant is not the owner of the mines and minerals on both sides of the line, as he has sold those on the east side, and has therefore not even the rights given to such owners. The case has in fact been decided by *Pearson*, J., on the application for an injunction (3). The Defendant can work from the west side, and the company must compensate him for any extra expense.

Rigby, Q.C., *Douglas Walker*, and *Chadwyck Healey*, for the Defendant:—

The minerals being reserved by the Act to the landowner, he has a right to get them in the usual way by going over the surface of the land, and he is not obliged to tunnel, the expense of doing which might in fact amount to the forfeiture of the minerals: *Earl of Cardigan* v. *Armitage* (4). The company must either pay us for the minerals or let us get them in the usual way. The company might when they bought the land have bought also the minerals, but then they would have had to pay for them, and they are now trying to get the same advantage as if they had done so. The landowner has a right to get his minerals, as if the railway was not there, even if in so doing he destroys the railway. The landowner has no doubt sold the land on the east side of the railway, but the company have nothing to

(1) 20 Ch. D. 552.
(2) 11 Ch. D. 611.
(3) 30 Ch. D. 634.
(4) 2 B. & C. 197.

do with that, and he cannot thereby have lost any of his rights as against them. He could even now have put himself in the position of landowner on both sides, but there is no occasion for him to do so. Perhaps the Defendant could get access under one of the loop lines, but that is no reason why he should lose his right to access over the main line. Of course if they could shew that he could get access in some equally convenient way it might be different, and he must not make an unreasonable use of this right to cross the line. They cannot say "you must not cross the line because, if you choose to pay, you may have another mode of access provided."

[STIRLING, J.:—Is the difficulty not caused by your own act?]

In a certain sense it is, but not by my own wrong. There is nothing in the Acts to prevent a landowner from dealing as he pleases with the rest of his land. It would be a new obligation thrown on him that if he wants to sell the land on one side he must sell the land on the other side too, or lose his rights. In many cases, as for instance where there was a ravine on one side, the railway company might cut off a piece of land and leave the minerals unattainable. Is it reasonable to hold that under sects. 80 and 81 of the Act of 1845, a landowner can only get compensation for the minerals when he owns land on both sides of the railway? Under his agreement with *Clarkson* the purchaser of the land on the east side, the Defendant has a right of way, and why should he not use it.

Sir *H. Davey*, S.G., in reply:—

The Defendant has access from the west, and why should he claim the right of crossing the railway whenever and wherever he pleases, for the argument amounts to that? He has a right under the Act to make proper passages from the west, and to call on the company to pay for them. He has parted with his land on the east and therefore is no longer "owner, lessee, or occupier of mines, extending so as to lie on both sides of the railway." If he has been foolish enough to put himself in the position of not being able to work his own minerals, so much the worse for

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him. As to his right to go on the surface, a railway company is not in the position of an ordinary purchaser, and these provisions in the Act are to provide against it. Moreover he claims a right to work the clay openly. He may dig pits and sink shafts, but may not destroy the surface which he has sold: *Bell* v. *Wilson* (1); *Hext* v. *Gill* (2). No such right is given by the Acts. Sect. 79 of the Act of 1845 shews this, and that he must work the mines in a proper way. *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (3), merely shews that the minerals may be worked from beneath, even if they let down the surface.

Douglas Walker, in reply, on the counterclaim for compensation:—

The landowner is not bound to go to the other side of his land because that will be more convenient to the railway company, but may go where it is convenient to him. He is not to lose his rights because a railway has been made. As a matter of fact the clay cannot be profitably worked from the other side. The minerals are ours, and we must either be allowed to work them profitably or be paid for them. Is the company to keep them for ever, and leave us to bear the loss?

The arguments on the language used in the special Act and in the *Railways Clauses Act*, 1845, are fully referred to in the judgment of the Court.

1886. July 3. STIRLING, J.:—

By an Act of Parliament of 6 Will. 4, c. lxxviii., the predecessors in title of the Plaintiffs were authorized to make a railway from *Rugby* to communicate with the towns of *Leicester*, *Nottingham*, and *Derby*, and they were authorized for that purpose to purchase subject to the provisions of the Act the necessary lands. Sect. 82, provides that nothing contained in the Act shall "extend or be construed to extend to give the company any coal, ironstone, limestone, stone, slate, or other mines or minerals under any land taken or purchased by the company under the

(1) Law Rep. 1 Ch. 303. (2) Law Rep. 7 Ch. 699.
(3) 20 Ch. D. 552.

provisions and powers of the Act, except only so much of such coal, ironstone, limestone, stone, slate, or other mines or minerals as shall have been made the subject of compensation, and be necessary to be dug or carried away" in making the line, "but all such mines and other minerals, except as aforesaid, shall be deemed to be excepted out of such purchase, unless otherwise stipulated in the deed of conveyance."

The railway was constructed in accordance with the Act, and it passes through the parish of *Knighton*, in the county of *Leicester*, and there runs nearly due north and south. For the purpose of constructing the line the predecessors of the Plaintiffs purchased, by an agreement made in the year 1837 with the predecessor in title of the Defendant, a strip of land which now constitutes the site of the main line of the Plaintiffs' railway. At this time the Defendant's predecessor in title was the owner of land on both sides of the line; and the agreement of 1837 provided that the vendor should have access from one portion of his property to the other by means of a level crossing and an archway under the railway. Subsequently another Act was passed in the year 1847, which incorporated the *Railways Clauses Consolidation Act*, 1845, and consequently incorporated the well-known provisions as to minerals, which are to be found in sect. 77 and the following sections of that Act. The predecessors in title of the Plaintiffs purchased, under the powers of the Act of 1847, the lands of the Defendant's predecessor in title lying on the west side of the line; and they have in pursuance of the same powers constructed on the land so purchased two branch lines of railway which, with the main line, form a triangle enclosing an area of about seven acres. Two small portions of this last-mentioned land have been severed by these branches from the triangular area, and on a plan which has been proved in the action, and which was much used at the trial, they are denoted by the letters E and F. The conveyances of the second portions of land thus purchased were not executed until the 21st of June, 1850. On that day two conveyances were executed, one of the portion of land purchased in 1837, and the other of that purchased under the Act of 1847. Neither conveyance contained anything as to the minerals, and consequently under the provisions of the Acts neither operated to pass any

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minerals to the Plaintiffs. Further, neither of the conveyances contained any provision as to the level crossing mentioned in the agreement of 1837; but as to the archway mentioned in the agreement it was stipulated that the westward opening thereof should be bricked up so as to prevent any passage through the same; and that the Defendant's predecessor in title should be at liberty to convert the space therein into a shed for cattle and to use the same accordingly.

The next fact which it seems necessary to mention is this; that by a deed dated the 19th of March, 1870, the Defendant's predecessor in title conveyed to one *Clarkson*, in fee, the land on the east side of the railway, or, at all events, so much of that land as immediately adjoined the railway. So that, under these circumstances, in April 1885 matters stood as follows: The Defendant had no interest either in the surface of the land lying to the east of the main line or in the minerals under it. He was the owner of the minerals under the land lying to the west. The Plaintiffs were the owners of the surface of that land; but the Defendant had acquired an interest both in the surface and in the minerals of the severed portions marked E and F on the plan, which apparently had been sold by the company as superfluous land.

Now it appears that the lands of which the Plaintiffs are thus the superficial owners, if I may so term them, contain a valuable stratum of earth or clay; and the evidence which was adduced at the trial shewed—and indeed there was no dispute—that the usual mode of working that earth or clay in the district was by means of open workings from the surface. On the 4th of April, 1885, the Defendant gave notice to the Plaintiffs of his intention, at the expiration of thirty days from that date, to work, dig, get and carry away the clay and other minerals under the pieces of land conveyed by the two deeds of the 21st of June, 1850. On the 13th of June, 1885, the Plaintiffs gave to the Defendant a counter notice declining to admit the right claimed by the Defendant's notice; but this counter-notice went on to say that, inasmuch as the working and carrying away of the minerals under such of the portions of the pieces of land referred to in the Defendant's notice, as were coloured red on a plan annexed to the Plaintiffs' notice, would damage the Plaintiffs' railway, they gave

notice that they were willing to make compensation for any estate and interest to which the Defendant might be entitled in the mines and minerals in and under the several pieces of land coloured red on the plan annexed thereto. The pieces of land on that plan coloured red comprise, roughly speaking, so much of the land conveyed by the deeds of the 21st of June, 1850, as now constitutes the site of the main and branch lines of the railway.

On the 19th of June, 1885, the Defendant gave notice to the Plaintiffs that he claimed from them the sum of £12,000, to include payment for the minerals under the pieces of land so coloured red and also compensation for the minerals in the triangular space between the company's lines to which the Defendant claimed to be entitled under sect. 81 of the *Railways Clauses Consolidation Act*, of 1845, or otherwise: and that he desired to have such claim, if disputed by the Plaintiffs, referred to arbitration. To this the Plaintiffs, through their solicitors, objected that the Defendant had no right to insist on the Plaintiffs purchasing the minerals within the triangular space, and that the arbitration must be restricted to the minerals referred to in the Plaintiffs' notice. A correspondence thereupon took place between the solicitors of the parties, in the course of which the Defendant asserted his right, and announced his intention: to work the minerals within the triangle and to cart them across the lines. Thereupon, on the 7th of July, 1885, the writ in the first action was issued, and the company thereby claimed an injunction to restrain the Defendant, his agents, servants, and workmen from passing, with or without horses, carriages, vehicles, and appliances, over or otherwise trespassing upon the surface of the Plaintiffs' railway. In consequence of the correspondence, to which I have referred, the Defendant on the 24th of July gave to the Plaintiffs three notices. The first recited that certain questions of compensation were then pending between the Plaintiffs and the Defendant; and that the Plaintiffs had given notice in writing, dated the 13th of June, 1885 (which was recited), and that the Defendant had theretofore made a claim for compensation in respect of certain other minerals adjacent to those which the Plaintiffs had given notice to take; but that the Plaintiffs did not admit that a case for compensation in respect of such minerals

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had arisen; and then the Defendant gave notice that he withdrew all claim, in the pending arbitration, for compensation in respect to any other minerals than those which the Plaintiffs had given notice to take; but that such withdrawal was made solely because the Plaintiffs did not admit that a case of compensation in respect of such other minerals had arrived, and the Defendant thereby expressly reserved his rights as to compensation in respect of such other minerals in a future proceeding. The second notice was of the appointment of an arbitrator to determine the amount to be paid by the Plaintiffs for the Defendant's interest in the mines and minerals in and upon the lands and hereditaments in respect of which the Plaintiffs had given notice in writing, dated the 13th of June, 1885, that they were willing to make compensation. Then by the third notice the Defendant gave notice that he could not consent to have the question of his rights to work the minerals at or near *Knighton Junction*, in the county of *Leicester*, delayed until the trial of an action commenced by the Plaintiffs; but that he would, within six days from the date of the notice, proceed to enter upon and cross the company's railway at *Knighton Junction* aforesaid, for the purpose of working and carrying away the minerals in and upon the triangular space lying within the company's lines, or otherwise, as might be necessary. On the 25th of July, 1885, the day following this notice, the Plaintiffs gave notice of motion for an injunction. That motion was heard before Mr. Justice *Pearson*, who granted an injunction until the trial of the action.

On the 8th of August, 1885, the Defendant entered into an agreement with *Clarkson*, to whom the land on the east side of the Plaintiffs' main line had been conveyed by the deed of the 19th of March, 1870. Under this agreement the Defendant is entitled to a right of way over the land comprised in that conveyance to *Clarkson* for the purpose of working the minerals in and under the triangle. On the 26th of August the Plaintiffs served an amended notice of their willingness to pay compensation for the minerals under the main and branch lines; and, at the same time, they intimated their willingness to make, and permit to be made, all passages and communications under the railway which the Defendant was entitled to demand or require for the purpose of

working or getting away the residue of such mines and minerals as were not required by the Plaintiffs under their notice. In consequence of this notice an attempt was made to come to an arrangement as to the making of passages and communications under the railway for the purpose of working the minerals, and plans of such passages and communications between the triangular area and the land on the east side of the main line were prepared on behalf of the Defendant and submitted to the Plaintiffs, and were considered by them. Ultimately, after some negotiations, they were thus dealt with by the Plaintiffs' solicitors in a letter of the 25th of November, 1885: "In reply to your letter of yesterday the plan and section you submitted have been carefully examined on behalf of the company. We are now instructed to inform you that the company do not admit your client's right to have the communications formed, or that if such right exists they are reasonable and proper works. We are, however, authorized to inform you, without prejudice to the company's legal position, that the directors will be prepared to give instructions for the two tunnels adjoining Mr. *Clarkson's* brickworks to be proceeded with upon your client depositing with the secretary the amount of their estimated cost, which we are informed is £2450. The directors have not yet taken into consideration the application for the other two tunnels, believing that they are not immediately required. Further legal questions of some importance may arise as to these." I treat that letter (in accordance with the view presented to me by the Defendant's counsel and not repudiated by the Plaintiffs) as a refusal by the Plaintiffs to allow any communications to be made from the east to the west of the main line.

In the meantime, apparently in the first instance on the 11th of August, 1885, and subsequently on various dates in October and November, 1885, the Defendant entered, from the land on the east side of the main line, upon the surface of the land within the triangular area and removed turf and soil therefrom, and made excavations with the view of asserting his right to work the earth and clay which has been already referred to. On the 25th of November, 1885, the Plaintiffs commenced the second action, in which they allege that these acts of the Defendant were

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trespasses, and they claim an injunction and damages. Both these actions have been prosecuted, and have now come on for trial together. In the meantime the arbitration between the Plaintiffs and the Defendant has proceeded, and the Plaintiffs have become the purchasers of the minerals specified in the notices of the 13th of June and the 26th of August, 1885. Defences and counter-claims have been put in in both actions, and before I deal with the main points to be decided in these actions I may refer to what I may call certain subsidiary defences, and dispose of them. [His Lordship then stated that in his opinion these defences failed, one being as to the level crossing mentioned in the agreement of 1837.]

The questions which I am to determine are whether the Defendant is entitled to work the earth and clay under the triangular area, and how? It was decided by Mr. Justice *Kay*, in the case of the *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1), that clay of a similar nature was a mineral excepted out of the conveyance to a railway company by virtue of the 77th and following sections of the *Railways Clauses Consolidation Act*, and might be dug and worked by the owner unless the company were willing to make compensation to him under the provisions of that Act. The present case was argued before me on the footing that the *Haunchwood Case* was binding on me, and was to be questioned, if at all, only in the Court of Appeal. I have already said that in August last an injunction was granted by Mr. Justice *Pearson* in the first of these actions. On that occasion, to a large extent, that learned Judge entered into the question as to the rights of the parties; and particularly he considered and discussed the construction of the *Railways Clauses Consolidation Act*. The lamented Judge prefaces his judgment, which is reported (2), in this way: "I do not intend to express a finally concluded opinion as to the proper construction of the sections of the *Railways Clauses Consolidation Act*, because I am now dealing with an interlocutory application only." But although he did not express a finally concluded opinion upon the proper construction of these clauses, it is an opinion to which the greatest weight is due, and it is one from which I should find

(1) 20 Ch. D. 552. (2) 30 Ch. D. 634.

it difficult, under any circumstances, to depart. However, I have thought it my duty to consider the case in the same way as I am sure that lamented Judge would have done if he had been spared to give the clauses the reconsideration which he obviously intended to reserve to himself; and, having done so, I am of opinion that the conclusion which he arrived at and the reasons which he gave in that judgment, are perfectly well founded, and I desire, with the greatest respect, to adopt them as my own.

It would seem from the report that it was supposed at the hearing of the motion that the Defendant still continued to be the owner of the land and mines on the east side of the line. I understand, however, from Mr. *Chadwyck Healey*, who was counsel on the motion, that the true state of the facts appeared before Mr. Justice *Pearson*: and I find nothing in the judgment to shew that when he speaks, as he does (1) of the Defendant being the owner of the mineral property lying on both sides of the railway here, he was not referring to the Defendant's interest in the triangular area, and in the severed portions marked E and F. But whether that be so or not, it is the fact that in respect of the interest of the Defendant in those portions, the Defendant is, in the language of the Act, owner, lessee, or occupier of mines extending so as to lie on both sides of the Plaintiffs' railway; and consequently the Defendant is entitled to work the minerals in and under the triangular area by means of passages made in accordance with sect. 80 of the *Railways Clauses Consolidation Act*, under the railway between that area and the severed pieces of land marked E and F. No objection has ever been taken by the company to the working of the minerals under the triangular area in this way, and, in fact, it has never been proposed by the Defendant. The reason, having regard to what was stated at the trial, is not far to seek. It would not be a profitable mode of working the clay, and the main struggle, both in Court and out of it before the bringing of the action, was as to the right to work these minerals from the east side of the railway. [His Lordship then read part of the statement of defence.] Therefore the Defendant raised by that defence the question as to whether he is entitled by implication of law to a right of way across the

(1) 30 Ch. D. 641.

STIRLING, J. railway in order to work the minerals; and that was argued, and strenuously argued at the trial before me; and upon that I desire to make a few remarks.

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It seems clear on the authorities with regard to rights of necessity (I may refer to *Pinnington* v. *Galland* (1) and *Corporation of London* v. *Riggs* (2))—that where a grant is made with an exception or reservation in favour of the grantor, the so-called rights of necessity, or implied rights, which, under that reservation, pass to the grantor, take effect by way of re-grant by the grantee to the grantor, and are limited by the necessity of the case. Now at the time when the conveyances by the Defendant's predecessor in title to the railway company were executed, the Defendant's predecessor in title was owner of the mines lying under the main line and under the lands lying on both sides of it. I will deal first with the case of the title arising under the *Railways Clauses Act*, and reserve for further consideration the operation of the Act of 1836, which differs in its language somewhat from that of the *Railways Clauses Act*. Under those statutory provisions the Defendant's predecessor in title was entitled, in case the company did not purchase any of the minerals, to work them, beginning from his property on the east side continuously through the railway; or, if the company did exercise their powers and took a portion of the minerals under the railway, he was entitled under sect. 80 to make passages and communications from one part, on the east, to the other part, on the west. That being so, he had it perfectly in his power, so far as I can see, to work his minerals; and the necessity, which is the foundation of the implication of the grant, does not appear to exist, so far as the matter stood while he remained owner of the land on the east side of the line. Then he sold and conveyed the land on the east side of the line to *Clarkson*; and it is obvious that, according to the principle to which I have already referred, if any rights by implication arose upon that transaction they must be rights between *Clarkson* and the Defendant's predecessor in title—not any rights as against the railway company, because the railway company on that occasion were neither grantors nor grantees, and had nothing to do with that transaction at all.

(1) 9 Ex. 1. (2) 13 Ch. D. 798.

Whether in point of fact any such rights arose by implication as between the Defendant and *Clarkson*, it is not necessary for me to consider, because the case has been presented to me, and argued before me, on the footing of the sole right of the Defendant being under the agreement of the 8th of August, 1885, and being merely a right of way over the property comprised in the conveyance to *Clarkson*. That being so, I cannot see any foundation, so far as the case is governed by the *Railways Clauses Consolidation Act*, for implying any right of way over the railway.

I shall now proceed to consider another point which was also argued before me. It was contended on behalf of the Plaintiffs that in no case was the Defendant entitled to enter on the surface of that triangular area; that is to say that, supposing he made his communications under the railway and got lawfully and properly to the triangular area, he would still be compelled to work underground, so to speak, and not go on the surface so as to work the minerals by open workings, as is proved to be the usual mode of working such minerals in that district. Now, with reference to that, it may be desirable to refer to the case of *Great Western Railway Company* v. *Bennett* (1), where the question arose whether the owner of mines under a railway, which the railway company had not taken, was entitled to work them so as to let down the railway; and the view taken by the House of Lords in that case cannot be better expressed than in the following paragraph from the judgment of Lord *Cranworth* (2): "It was obviously the intention of the Legislature, in making these provisions"—that is, the provisions of the *Railways Clauses Act*—"to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine-

(1) Law Rep. 2 H. L. 27. (2) Law Rep. 2 H. L. 40.

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owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company), that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature; and that intention is fully carried into effect by giving to the mine owner, in this case the respondent, Mr. *Bennett*, that which the Court below has given to him, namely, the full right in all the mines which he worked, just as if he had not sold the surface."

Now let us turn to the code which Lord *Cranworth* there refers to, and see what rights of working are given to the mine-owner. These are expressed in the 79th section: "If before the expiration of"—the period there mentioned—"the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." Therefore he is entitled to work the mines according to the usual manner of working such mines "in the district where the same shall be situate," and it appears to me that under that he is entitled, when once he gets lawfully and properly upon the land, to work by open workings from the surface, as he contends. The Solicitor-General, who argued the case for the Plaintiffs, founded his objection partly on this. He said the conveyance was made to the railway company for the purpose of the railway and in order that the railway might run there; and he contended that it would be a trespass on the part of the Defendant to enter upon

the surface of that railway—a derogation, in fact, from his own grant. Now it appears to me that that view of the case is not consistent with the view which was taken by the House of Lords in the case of *Great Western Railway Company* v. *Bennett* (1), with reference to a very analogous question, viz., whether the mine-owner was entitled to work the mines in such a way as to let down the surface of the railway. It is contended here that the mine-owner must not work his mines in such a way as to obstruct the railway. There it was contended that he must not work his mines in such a way as to let down the surface of the railway. In both cases I apprehend that if the effect of the conveyance were to be regulated by the common law those contentions would have been well founded; but it was held by the House of Lords in the case of *Great Western Railway Company* v. *Bennett*, that the ordinary presumptions of law did not apply, and that the case was to be governed exclusively by the provisions of the *Railways Clauses Act*, and that the mine owner was entitled to work his mines just as if he had not sold the surface and so as to let it down. Here, it appears to me, that, on the same principle, the mine-owner is entitled to work according to the usual manner of working such mines in the district where the same are situate, just as if he had not sold the surface, and, accordingly, to go on the surface for the purpose of working, where that is the usual and ordinary manner of working. The Solicitor-General further referred to some remarks of Mr. Justice *Kay* in the *Haunchwood Case* (2), and urged that that case was in favour of the view for which he was contending. In that case, as in this, the railway company were the plaintiffs, and claimed an injunction to restrain the *Haunchwood Brick and Tile Company* "from entering on the surface of the railway company's land, and from digging or working the clay in any manner not usual." They expressly claimed an injunction to restrain the brick and tile company from entering on the surface of the railway company's land. That injunction was not granted, and the action was dismissed; so that in point of decision it does not support the argument of the Solicitor-General. But the passage of the judgment which was referred to was this (3): "It is argued

(1) Law Rep. 2 H. L. 27. (2) 20 Ch. D. 552. (3) 20 Ch. D. 560.

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that, even if the clay be reserved, yet the owners cannot work it, because, according to these provisions, particularly sect. 79, they can only employ the usual mode, and that being by open workings, they must dig from the surface of the line, and this would be a trespass. But this seems to me an ingenious distortion of the provision, which is clearly intended in the company's favour in case a mine is worked under or near the line, to prevent unnecessary excavation, which might cause more risk or damage than the usual mode of working. It cannot mean that the owner of a bed of clay shall only work it by trespassing, so as to enable the company to prevent him from working it at all. It is clear that the clay may be got and the railway destroyed by working from the side and excavating without going upon the railway at all; and, as letting down the surface is, according to *Great Western Railway Company* v. *Bennett* (1), not a trespass or wrong, I do not think, if the clay is reserved, that the company would be entitled to an injunction on this ground to prevent the working." It seems to me, looking at the language of the learned Judge, that he did not mean to decide, at all events, contrary to the view which I have just expressed, and that at the most he abstained from expressing an opinion upon the subject. That being one of the questions in this action it seems to me that in this part of the action the Defendant's contention is right.

Before considering how these conclusions will apply to the facts, it may be desirable to refer to the provisions of the special Act of 1836. I have already read sect. 82. [His Lordship then read parts of sects. 83, 84, and 87.]

Having read those sections, and having compared them with the corresponding sections of the *Railways Clauses Act*, 1845, it does not appear to me that they differ from the clauses in the *Railways Clauses Act* in any manner favourable to the Defendant.

Now, applying the conclusions to which I have thus come to the facts proved in the case it appears to me that the right of the Defendant is to work the minerals in and under the triangular area by means of passages in or under the railway between that area and any mines lying on the other side of the main and branch lines of which the Defendant is owner, lessee, tenant, or

(1) Law Rep. 2 H. L. 27.

occupier. He is owner, lessee, or occupier of such mines as regards the severed portions marked E and F. The company have never in any way objected to the exercise of any rights which he may be entitled to in respect of those lands. If, by reason of that mode of working, he is put to any extra expense over and above what he would have been put to if he had worked the mines continuously, he will get compensation from the company in respect of that under sect. 81; but, as I have already said, the struggle has been throughout in respect of the right to work from the east side, and there the Defendant is not owner, lessee, or occupier of any such mines, his sole existing rights on that side of the line being those derived under the agreement of August, 1885, which confers on him a mere right of way, and nothing more. I think, therefore, that in the present state of circumstances he is only entitled to work the mines in the triangular area by going from the severed portions marked E and F by passages made under the railway; and when he gets there he will be entitled to work upon the surface. That is the extent of his right.

I have now to consider the question of compensation which is raised by the counter-claim, and in order to deal with that I must go back and state a few more facts, those being with reference to certain notices which were given by the Defendant in the month of December, 1885. [His Lordship then read at length the notices.]

In dealing with this it appears to me that, whether we look at the *Railways Clauses Act*, or at the special Act of 1836, the right of the owner of the mines which are not purchased by the railway company is to work them, and that he is not entitled to compensation unless he brings himself under the special clauses of the Act which give compensation. The notice demanding compensation is framed upon the view that the Defendant is by severance debarred from working the mines in the triangular area. It appears to me that that view is not well founded in fact, and that the Defendant is not so debarred. He is perfectly at liberty to work his mines by proceeding from the severed portions marked E and F upon making the proper passages and communications; and, as I have already said, for any extra expense which is thrown upon him by that mode of working, he will be entitled to

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compensation under the 81st section of the *Railways Clauses Act*. It seems to me that that is really a sufficient answer to the claim for compensation. The railway company say: "You say you desire to work these minerals; work them; we throw no obstacle in the way of your making proper communications between them and the severed portions marked E and F, and you do not bring yourself within the provisions of the *Railways Clauses Act* for compensation, except to the extent of any extra expense which may be thrown upon you by working in that way." As to that compensation there has never been any dispute as far as I know, or any unwillingness on the part of the railway company to pay.

But even treating him as being severed by the purchase by the company of the minerals under the main line and as founding his claim to compensation, (which is in effect a claim that the railway company may take and pay for all the minerals under the triangular area,) on the provisions of the Act of 1836, not on the *Railways Clauses Act*, I have great difficulty in arriving at the conclusion that what he claims is damage for severance within the meaning of the 83rd section of the Act, which I have read. I have already said that the right of the owner of mines is to work his minerals when he desires to do so. If he deals with his other property in such a way as to prevent himself from getting to those minerals when the time comes at which he desires to work them, that is no reason why the railway company should purchase them. Suppose, for example, that in the present case there had been no purchase by the railway company of any minerals, and that the Defendant had, as he has here done, sold his property on the east side of the line in such a way as to give himself no access to those minerals, and then he serves notice on the railway company of his intention to work those minerals. The railway company say: "Work them; we throw no obstacle in the way of your making such passages and communications under the railway as you may be entitled to." He answers: "I cannot, because I have sold my land on the east side of the line, and I have not reserved to myself any such rights of occupation or other rights as would entitle me to make the passages and communications." The railway company would reply: "That is your affair and not ours; your right under the

statute is to work them; we do not interfere with that; if you have not, on your selling the property, reserved to yourself such rights over the sold property as to enable you to work, that is no reason why we should take and pay for them." There is no impossibility proved of working the minerals by such communications if made, and even apart from the considerations which I have dwelt upon, the Defendant would not be entitled to say that the company were bound to take, or at all events, to pay for those minerals by way of damage for severance within the meaning of the 83rd section. That disposes of the whole of the questions between the parties except the question of costs.

Now as regards the first action, it seems to me that the company have been perfectly right throughout, and that the Defendant must pay the costs of that action. As regards the second action, treating the questions involved in it as questions of substance, it seems to me that the Plaintiffs were partly right and partly wrong. They are right in so far as they say that the Defendant had no right to make the communications between the east side of the line and the west—they are wrong, in so far as they say that under no circumstances at all is the Defendant entitled to go on the surface of the triangular area; that is to say, the surface of the portion which includes the minerals which they have not bought. Treating it in that way, I think I shall deal very fairly if I give no costs of this action on either side. As regards the claim for compensation, it seems to me to be wrong, and the Defendant must pay the costs of that.

[His Lordship then stated what would be the form of the judgment, and that as to the injunction against working from the east side, liberty ought to be reserved to apply in case of the Defendant becoming owner, occupier, or lessee of the land to the east.]

Solicitors for Plaintiffs: *Beale & Co.*

Solicitors for Defendant: *Gedge, Kirby & Millett,* for *Berridge & Miles, Leicester.*

C. M.

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CHARITY—*Cy-près—Failure of Object—Lapsed Legacy.*] A testator, a tinplate worker, bequeathed £1000 Consols to the Master, Wardens, &c., of the Tinplate Workers Company, upon trust with the proceeds when a proper site could be obtained to build in such part of England as they should think fit almshouses for the use, first, of poor liverymen of the company, then of poor freemen of the company, and, lastly, of any poor men of the trade of a tinplate worker: and he declared that he had made the bequest in the hope that some other person, actuated by the same charitable feelings, would thereafter sufficiently endow the almshouses: and he bequeathed the residue of his estate to various persons.—After the testator's death the company unsuccessfully endeavoured to obtain a site for the almshouses, and it appeared that there was no reasonable prospect of a site being obtained, and that, even if it could be, the company had no income available for the endowment and maintenance of the almshouses:—*Held*, that as the object of the gift had failed, the fund fell into the residue as a lapsed legacy, and was not applicable *cy-près*. *In re* White's Trusts - - - - 449

2. —— *Mortmain — Assignment of Harbour Duties—Interest in Land—9 Geo. 2, c. 36.*] A bond by Harbour Commissioners in the form prescribed by their Act assigning the duties which they were empowered to levy on ships entering and leaving the haven, or loading or unloading in the roads, and which were to be applied: 1, in payment of the expenses of obtaining the Act; 2, in payment of the interest of moneys advanced for defraying such expenses; 3, in payment of the interest of moneys borrowed under the Act; 4, in defraying working expenses; and, 5, in payment of principal moneys borrowed under the Act, is not an interest in or affecting land within the Mortmain Act (9 Geo. 2, c. 36), and may be given by will for charitable purposes.—*Knapp* v. *Williams* (4 Ves. 430, n.) questioned.—*Ion* v. *Ashton* (28 Beav. 379) not followed.—*Attorney-General* v.

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3. —— *Trust—Perpetuity—Repair of Tomb—Repair of Churchyard—Church Building Act* (43 *Geo.* 3, *c.* 108), *s.* 1—*Mixed Objects of Legacy—Apportionment.*] A bequest of money, not exceeding £500, on trust to apply the income in repairing a churchyard, is good under the Act 43 Geo. 3, c. 108, s. 1, and is a charitable legacy.—A testator bequeathed £500 on trust to invest, and to apply such part of the income as might be necessary in keeping a family vault in repair, and to apply the residue of the income in keeping in repair a tomb and the churchyard in which the vault and tomb were situated:—*Held*, that the trust to keep in repair the vault was void, and that the portion of the fund devoted to that purpose fell into the gift of the residue; that the residuary trust was void so far as it related to keeping in repair the tomb, and valid so far as it related to keeping in repair the churchyard; and that the void portion of the bequest was so much of the £500, the amount to be ascertained by affidavit, as when invested in consols would produce sufficient income to keep in repair the tomb. *In re* Vaughan. Vaughan *v.* Thomas - 187

COMPANY—*Contract by Trustee for intended Company—Void Contract—Ratification—New Contract.*] A written agreement was entered into between W. of the one part and D., as trustee for an intended company, to be called the N. Company, of the other part, that W., who was entitled to an agreement for a building lease from the Metropolitan Board of Works, should grant an underlease to the company, and that the company should erect the buildings. The company was registered on the following day. The memorandum did not mention the agreement, but the articles adopted it, and provided that the company should carry it into effect. No fresh agreement with W. was signed or sealed on behalf of the company, but the company took possession of the land, expended money in building, and acted on the agreement, which they considered to be binding on them. The company failed to complete the buildings, and the Metropolitan Board re-entered. The company being in course of winding up, the trustee in bankruptcy of W. took out a summons to be allowed to prove for damages against the company for their breach of the agreement:—*Held* (affirming the decision of Chitty, J.), that the agreement having been entered into before the company was in existence, was incapable of confirmation, and that the acts of the company, having evidently been done under the erroneous belief that the agreement between W. and D. was binding on the company, were not evidence of a fresh agreement having been entered into between W. and the company on the same terms as the written agreement, that there was therefore no agreement between W. and the company, and that the summons must be dismissed. *In re* Northumberland Avenue Hotel Company - - - - - C. A. 16

2. —— *Powers of Directors—Application of Company's Funds—Payment of Costs of Legal Proceedings—Libels against the Directors—Libels against the Company—Payments for Proxy Papers—Ultrà vires.*] The directors of a limited company prosecuted the proprietors of a newspaper for libels impugning their honesty in the management of the affairs of the company. The newspaper proprietors were convicted, the directors paid the costs of the prosecution out of the funds of the company, and such payment was made known to a general meeting held before action brought.—The directors also successfully prosecuted one B. for libelling both the company and themselves, and paid the costs of the prosecution out of the funds of the company after action brought.—There were over 15,000 shareholders, and the directors sent to each of them before the general meetings a stamped proxy form containing the names of certain of the directors as proxies and inclosed in a stamped cover for return, and paid the expense of printing, posting, and stamping these forms out of the funds of the company.—In an action by a shareholder for a declaration that such payments were not chargeable against the company:—*Held*, first, that as the libels in the newspaper were not direct libels on the company, the cost of the prosecution ought not to have been paid out of the funds of the company, but that there was no case for an injunction, and, following *Pickering* v. *Stephenson* (Law Rep. 14 Eq. 322), that the Court ought not to direct repayment by the directors:—*Held*, secondly, that the costs of the prosecution of B., which was carried on entirely in the interests of the society, were properly payable out of the funds of the company:—*Held*, thirdly, that the payments for printing and sending out such proxy forms, and for stamping and paying the return postage thereon, were a misapplication of the funds of the company beyond the power of a general meeting to sanction; and that though no repayment of the moneys so paid should be ordered, the directors must be restrained by injunction from using the company's funds in paying the stamps or return postage stamps on any proxy forms, or in paying for the printing or sending out any proxy forms with the names of the proposed proxies therein, or otherwise calculated to influence the votes of the shareholders. Studdert *v.* Grosvenor - 528

3. —— *Promoter—Secret Commission—Agent for Vendor.*] Although a promoter of a company cannot be considered an agent or trustee for the company, the company not being in existence at the time, yet the principles of the law of agency and trusteeship are applicable to his case, and he is accountable for all moneys obtained by him from the funds of the company without the knowledge of the company.—The fact that a promoter is acting as agent for the vendors in getting up a company for the purchase of their property does not exonerate him from accounting to the company, when formed, for any secret profit made by him.—In estimating the amount of the secret profit for which a promoter was accountable to the company he was held entitled to be allowed the legitimate expenses incurred by him in forming and bringing out the company, such as the reports of surveyors, the charges of solicitors and brokers, and the cost of advertisements; but not a sum of money which he had expended in obtaining from another

COMPANY—*continued.*

person a guarantee for the taking of shares.—J., a member of a firm of iron merchants, was a promoter of a company for the purchase of mines, and was held accountable for a secret profit which he had made in the course of such promotion. W., his partner, received from him a sum of money out of the profit made by him in consideration of his guaranteeing the taking of certain shares. There was no evidence that W. knew of the profit that B. made, or knew that the sum received by him came out of the moneys of the company:—*Held*, that the promotion of companies not being within the scope of the partnership, W. was not accountable for the profits made by J., or for the money received by himself as the consideration for the guarantee. Lydney and Wigpool Iron Ore Company *v.* Bird - - - C. A. 85

4. —— *Winding-up — Jurisdiction — Foreign Company with Branch Office in England.*] A banking company, incorporated and carrying on business in Australia, had a branch office in London, but was not registered in England. The company had English creditors, and assets in England. Two petitions were presented to wind up the company, which had stopped payment, and on the hearing of the petitions an order was made appointing a provisional liquidator, and the further hearing was ordered to stand over for a time. The powers of the provisional liquidator were limited to the taking possession of, collecting and protecting the assets of the company in England, with liberty to apply in Chambers.—When the petitions came on again to be heard it appeared that a petition to wind up the company had been meanwhile presented in Australia, and a provisional liquidator had been appointed there, but it was not proved that a winding-up order had been made:—*Held*, that there was jurisdiction at the time when the petitions were presented to make an order to wind up the company, and that the jurisdiction could not be affected by subsequent proceedings in Australia.—A winding-up order was accordingly made, the order appointing the provisional liquidator being continued, with the same restrictions on his powers, the Judge expressing an opinion that the winding-up in this Court would be ancillary to a winding-up in Australia, and that, if the circumstances remained the same, the powers of the official liquidator when appointed ought to be restricted in the same way. *In re* Commercial Bank of South Australia - - - - - 174

5. —— *Winding-up — Witness — Companies Act*, 1862, *s.* 115—*Examination of Persons capable of giving Information — Pending Action.*] An order having been made for winding up a company, P., who held a mortgage on calls, and who was also a holder of shares, brought his action against the company and the directors, claiming to have his mortgage of calls enforced, and any deficiency made good by the directors, and also to have an agreement enforced, one term of which was that his shares should be cancelled, and to have his name removed from the register and from the list of contributories. Before issue was joined in this action, P., as an alleged contributory, obtained an order under sect. 115 of the Companies Act, 1862, for the examination of the

COMPANY—*continued.*

directors. The directors moved to have their examination under this order postponed till after the trial of the action, and Mr. Justice Chitty made an order accordingly:—*Held*, on appeal, that this postponement was right, for that the powers of sect. 115 were given for the more beneficial winding-up of the company, and ought not to be used for the purpose of giving to the plaintiff in an action brought to enforce his own individual rights, and which could not be for the benefit of the company, means of discovery beyond those which the law gives to a plaintiff. *In re* Imperial Continental Water Corporation - - - - - C. A. 314

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COPYRIGHT—*Book—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 13, 24—*Non-Registration of first Edition—Registration of subsequent Edition —Reprint of former Edition.*] The Plaintiff in an action for infringement of copyright in a book, the first edition of which was published in November, 1881, had not, before commencing such action, registered at Stationers' Hall either the first or a second edition which he had subsequently published; but he had registered a third edition, which was in fact a reprint of the first edition, describing it in the entry as a third edition, and giving the time of the first publication as the 22nd of April, 1885, which was the date at which the third edition was published:—*Held* (reversing the decision of Bacon, V.C.), that the Plaintiff had not truly stated the time of the first publication of his book within the meaning of sect. 13 of the Copyright Act, 1842, and consequently had not caused entry to be made of his book pursuant to the Act, and was precluded by sect. 24 from maintaining any action for infringement of copyright until he had made due and correct entry pursuant to sect. 13. Thomas *v.* Turner - - - - - C. A. 292

2. —— *Trade Name*—"*Castle Album*"—5 & 6 *Vict. c.* 45.] An album for holding photographs, with pictorial borders containing views of castles with short descriptions attached, is not a "book" within 5 & 6 Vict. c. 45, s. 1, so as to be capable of obtaining copyright for the contents.—An

COPYRIGHT—*continued.*
album thus illustrated was entitled by the Plaintiff, who claimed to have been the first inventor, the "Castle Album," and had been sold by him under that name since 1883, when the work was registered by him under 5 & 6 Vict. c. 45, and the illustrations under the Fine Arts Copyright Act (25 & 26 Vict. c. 68):—*Held*, that, as the Plaintiff could not by registration obtain copyright for the mere name "Castle Album" he had not in the absence of distinct evidence that such name had become generally accepted in the market as exclusively denoting the Plaintiff's album, acquired any exclusive right to the name as a trade name so as to be able to restrain the use of it by others to describe their albums similarly illustrated, but not shewn to be pirated from that of the Plaintiff. SCHOVE *v.* SCHMINCKÉ - 546

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—— Mortgage—Priority - - - 1
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—— Light - - - - 238, 471
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ELEGIT—Bankruptcy of debtor - - 493
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ENTRY AGAINST INTEREST—Evidence 127
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ESTOPPEL—*Rectification—Res Judicata—Money paid under Compulsion of Law.*] After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred.—C. & Co. built a ship for B., and a considerable sum remained due to them, for which they had a lien on the ship. M. had made advances to B. An agreement was made between the three parties for sale of the ship by C., and for the distribution of the proceeds. The agreement was very obscure, and left it doubtful in what order the claims of C. and of M. were to be paid. After the sale M. sued C. for an account of the proceeds, and judgment was given in the Court of the County Palatine for carrying into execution the trusts of the agreement, and for the requisite account. On taking the account before the Registrar, C. claimed to be allowed his debt, but the Registrar held that M. had priority. The proceeds were amply sufficient to pay M.'s claim, but not C.'s also. The Vice-Chancellor affirmed the view of the Registrar, and made an order for C. to pay M.'s claim. C. appealed, but the appeal was dismissed and the money was paid to M. After this C. brought an action to rectify the agreement by making it provide that C.'s claim should have priority over that of M. M. pleaded that the agreement having been executed and the money paid under the order of the Palatine Court, C. was not entitled to any relief:—*Held*, by Kay, J., that the action must be allowed to proceed, for that there was no estoppel on the ground of res judicata.—*Held*, on appeal, that the action must be dismissed, for that although, the question of rectification not having been before the Palatine Court, there was no res judicata, C. could not come to have the agreement rectified after it had been worked out, and the fund distributed, under the order of the Court in the Palatine action. CAIRD *v.* MOSS - - - C. A. 22

EVIDENCE—Entry against interest - 127
See LIMITATIONS, STATUTE OF.

—— Special examiner - - - 157
See PRACTICE. 6.

EXECUTION—Elegit—Bankruptcy of debtor
See Judgment. [493

EXECUTOR—*Payments made in Mistake of Law or Mistake of Facts—Liability to refund with Interest—Acquiescence.*] The decision in *Saltmarsh* v. *Barrett* (31 Beav. 349), that executors who, acting *bonâ fide*, have distributed the assets upon what turns out to be an erroneous construction of the will, are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, dissented from as departing from the principle established in *Attorney-General* v. *Köhler* (9 H. L. C. 654) and *Attorney-General* v. *Alford* (4 D. M. & G. 843).—But although as a general rule executors are liable to be charged with interest at 4 per cent. on sums improperly paid or improperly retained by them, they are not liable for interest to the legatee (or his representatives) to whom, with full knowledge on his part and in common mistake, the payments which he must refund have thus been erroneously made. *In re* Hulkes. Powell *v.* Hulkes - - - - 552

2. —— *Retainer—Married Woman—Funeral Expenses—Liability of Husband.*] A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *In re* M'Myn. Lightbown *v.* M'Myn - - - 575

EXONERATION—Locke King's Act - 195
See Will. 3.

FEES—Refreshers - - - - 52
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FIDUCIARY RELATION—Purchase by solicitor
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FORECLOSURE - - - - 226
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FOREIGN COMPANY—Winding up—Jurisdiction - - - - - 174
See Company. 4.

FOREIGN CORPORATION—Service on London agent - - - - 446
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FOREIGN GOVERNMENT—Fund in hands of agent - - - - 459
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FOREIGN LOAN—Appropriation - - 459
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FUNERAL EXPENSES - - - 575
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GENERAL ORDER UNDER SOLICITORS' REMUNERATION ACT, r. 2; Sched I., Pt. II. - - - - - 40
See Solicitor. 1.

HARBOUR DUTIES—Mortgage of—Mortmain
See Charity. 2. [332

HUSBAND AND WIFE—Equity to a settlement
See Settlement. 2. [220

—— Liability of husband for wife's funeral expenses - - - - 575
See Executor. 2.

INDEMNITY—Claim for—Third party procedure - - - - - 497
See Practice. 13.

INFANT—*Maintenance—Charge on Infant's Estate in Remainder.*] Five infants were entitled to successive estates tail in real estate after the death of their grandmother, who was tenant for life. There being no income applicable for the maintenance of the infants, an application was made in an action on their behalf, that a sum of money for past maintenance and certain annual sums for future maintenance should be raised on the security of a charge on the estate; the tenant for life being willing to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession, and to join in the necessary deeds:—*Held*, that such an order could not be made.—*In re Howarth* (Law Rep. 8 Ch. 415) distinguished and doubted. Cadman *v.* Cadman - - - - C. A. 397

2. —— *Married Woman—Ward of Court—Settlement—Confirmation—Acquiescence—Jurisdiction—Administration Action—Sanction of Court—Practice—Petition—Infant's Settlement Act* (18 & 19 *Vict. c.* 43).] Where an action is pending for the administration of an estate in which an infant is interested, the Court has, in the event of the marriage of the infant, and either before or after the marriage, inherent jurisdiction, independently of the Infants' Settlement Act (18 & 19 Vict. c. 43), to make or sanction a settlement of the infants' property, whether reversionary or in possession.—Under the Infants' Settlement Act (18 & 19 Vict. c. 43), an infant may, with the sanction of the Court, and either before or after marriage, make a binding settlement of his or her property of every description. Where an action is pending it is not necessary for the validity of the settlement that the sanction of the Court should be given on a petition intituled under the Act: it is sufficient if the settlement is executed by the parties and approved by the Judge upon the Chief Clerk's certificate in answer to the usual order for inquiries as to a proper settlement.—A settlement that is voidable as having been executed by an infant married woman, may be confirmed by her acquiescence and conduct when of full age.—Upon the death of her father in 1848 S. became entitled under his will to a reversionary interest in his residuary personal estate. In 1856 a suit was instituted for the execution of the trusts of the will. In 1862, S., being then an infant of eighteen and a ward of Court, married without the sanction of the Court or the knowledge of her guardian. By an order made in the suit upon motion, an inquiry was directed whether there had been a valid marriage, and if so, what S.'s fortune was, and what would be a proper settlement of it. The Chief Clerk having made his certificate, a settlement was executed in 1863 by S. and her husband of S.'s reversionary interest upon herself for life, with remainder to the children of the marriage, the settlement being signed by the Chief Clerk as having been approved by the Judge. There were four children of the marriage. In 1882 a decree was made by the Probate and Divorce Division for dissolution of the marriage on S.'s petition. In 1886 the tenant for life of the fund, which was

INFANT—*continued.*
in Court, died; whereupon S. presented a petition in the suit asking for payment out of the fund to her on the ground that the settlement was not binding on her, she having been at the time of its execution an infant and a married woman, and the settlement not having been sanctioned by the Court in manner required by the Infants' Settlement Act (18 & 19 Vict. c. 43):—*Held*, that the settlement was valid either under the inherent jurisdiction of the Court over the property of its wards, or under the Infants' Settlement Act: also, that even if invalid in its inception, it had been adopted, confirmed, and acquiesced in by S. by various acts done by her during her coverture and after its termination. BUCKMASTER *v.* BUCKMASTER - - - - - - 482

INFRINGEMENT—Patent—Threats of legal proceedings - - - - 579
See PATENT. 2.

INJUNCTION—Patentee—Threats of legal proceedings - - - - 579
See PATENT. 2.

—— Railway company—Vendor's lien - 571
See RAILWAY COMPANY. 2.

INTEREST—Payment made by mistake - 552
See EXECUTOR. 1.

—— Payment of—Statute of Limitations—Evidence - - - - 127
See LIMITATIONS, STATUTE OF.

INVESTMENT—Liability of trustees - 347
See TRUSTEE. 2.

—— Purchase-money—Lands Clauses Act 609
See LANDS CLAUSES ACT.

—— Settled Land Act - - - 455
See SETTLEMENT. 4.

—— Solicitor—Priority - - - 402
See SOLICITOR. 4.

IRELAND—Money to be laid out in land 455
See SETTLEMENT. 4.

JOINT TENANCY—Severance—Vesting order
See TRUSTEE ACTS. 2. [103

JUDGMENT—*Elegit—Lands—"Delivery in Execution"—"Seizure"—Bankruptcy of Debtor—Receiving Order—Return of Writ—Sheriff—Priority—Bankruptcy Act*, 1883, *s.* 45, *sub-s.* 2.] The delivery of land of a judgment debtor in execution by the sheriff under a writ of *elegit* is a "seizure" of the land so as to make the execution of the judgment creditor "complete" within sect. 45, sub-s. 2, of the Bankruptcy Act, 1883; and a receiving order in bankruptcy made against the debtor after the delivery in execution, but before the return of the writ, does not oust the right of the judgment creditor. *In re* HOBSON 493

—— Estoppel - - - - - 22
See ESTOPPEL.

—— Satisfaction of by co-surety - - 575
See EXECUTOR. 2.

JURISDICTION—Winding-up—Foreign company - - - - - 174
See COMPANY. 4.

LANDLORD AND TENANT—*Prehistoric Chattel found beneath the Surface.*] In land demised to a gas company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authorized, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gasholder and other buildings, a prehistoric boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—*Held*, that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease. ELWES *v.* BRIGG GAS COMPANY - - 562

LANDS CLAUSES ACT—(8 & 9 *Vict. c.* 18), *s.* 80—*Costs of Re-investment.*] Where a fund, representing the price of houses taken for the purpose of a public undertaking had been transferred to the credit of an administration suit *ex parte* the undertakers' account of estates devised by the will, not specifying the special Act or the Lands Clauses Act:—*Held*, that the undertakers were liable to pay costs of re-investment. DRAKE *v.* GREAVES - - - - - 609

LEASE—Costs of preparing agreement—Solicitors' Remuneration Act - - 40
See SOLICITOR. 1.

—— Reservation of minerals—Prehistoric boat
See LANDLORD AND TENANT. 2. [562

—— Reservation of right of way—Regrant 420
See WAY.

—— Settled Estates Act - - - 599
See SETTLED ESTATES ACT.

LEGACY—Direction to settle - 274, 455
See SETTLEMENT. 3, 4.

—— Lapsed—Charity - - - 449
See CHARITY. 1.

LIEN—Banker - - - - 586
See BANKER.

—— Cestui que trust—Insufficient investment
See TRUSTEE. 2. [347

—— Vendor—Railway company - - 571
See RAILWAY COMPANY. 2.

LIGHT—*Alteration of Dominant Tenement—Obstruction—Abandonment—Injunction or Damages—Undertaking—Discretion of Court—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2—*Prescription Act* (2 & 3 *Will.* 4, *c.* 71).] The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of a statutory right, under the Prescription Act (2 & 3 Will. 4, c. 71), to the access and use of light to and for any building which may be substituted for the original building: the intention to abandon the right must be clearly established by evidence.—The nature of the statutory right to the access of light discussed.—*Scott* v. *Pape* (31 Ch. D. 554) considered.—The discretion given to the Court by sect. 2 of Lord Cairns' Act (21 & 22 Vict. c. 27), to award damages in substitution for an injunction in the case of a substantial interference with a plaintiff's ancient lights, is a discretion to be exercised according to

LIGHT—*continued.*

the facts of each particular case. Where the Plaintiff has, at the trial, established his statutory right as against a Defendant who has erected a building causing a substantial interference with that right, the Court will not compel him to accept damages or compensation instead of an injunction, especially where the Defendant has, during the progress of the action, given an undertaking to pull down, if so ordered at the trial.—*Holland* v. *Worley* (26 Ch. D. 578) not followed. Greenwood *v.* Hornsey - - - 471

2. —— *Prescription Act* (2 *& 3 Will.* 4, *c.* 71)—"*Building*"—*Structure for storing Timber—Air—Unity of Possession.*] *Per* Chitty, J.:—The words "other building" used in the Prescription Act (2 & 3 Will. 4, c. 71), sect. 3, in connection with "any dwelling-house, workshop"—mean some building of a like character with a dwelling-house or workshop, and will not necessarily include every structure which may be a building for the purposes of the Metropolitan Building Acts.—Accordingly a permanent structure used for storing and seasoning timber and shewing it to customers, which consisted of upright baulks of timber or standards fixed in stone bases built on brick piers, with cross-beams and diagonal iron braces, divided into floors or stagings with open unglazed ends or apertures between the uprights, and served for drying the timber and also for admitting light, is not a "building" within sect. 3, so as by twenty years' uninterrupted enjoyment of the access and use of light to and for the apertures to have acquired an absolute and indefeasible right thereto:—And (*per* C. A.) in order to acquire an absolute and indefeasible right to light under sect. 3, it must be shewn not only that there has been an uninterrupted access of light to the building in respect of which the easement is claimed, but also that the light has reached the building by one and the same definite channel for the statutory period. Without therefore deciding whether the particular structure was a "building" within the Prescription Act, sect. 3:—*Held*, that as from the nature of the structure and the mode of carrying on business timber would be so piled as from time to time to block up one or other of the apertures so that the Plaintiffs could not prove that there had been an uninterrupted access of light by any one aperture for the statutory period, their claim to an easement failed.—A right by way of easement to the uninterrupted access of air not coming by any definite channel but over the general unlimited surface of the alleged servient tenement cannot be acquired under the Prescription Act, sect. 2, by mere enjoyment for the statutory period; and the fact that the alleged dominant and servient tenements were both held under a common lessor, either of itself, or at any rate when coupled with the fact that the lease of the servient tenement was the earlier, negatived any claim to the easement as arising out of implied covenant. Harris *v.* De Pinna - C. A. 238

LIMITATIONS, STATUTE OF—*Evidence—Entry against Interest—Payment of Interest—Agency.*] N., a solicitor, lent money to S., a client, on equitable mortgage, and on the 12th of February, 1866, an account was settled between them as to the amount due. After this there were no entries relating to S. in N.'s ledger. In July, 1878, S. assigned the mortgaged property to his two nephews, subject to all incumbrances. In a diary kept by N., who had since died, was an entry dated the 10th of September, 1878, of the receipt of money from S. for interest. There was nothing else to shew payment of interest after 1866. In an action to enforce the security against the nephews, North, J., held that this entry was not admissible in evidence to take the case out of the Statute of Limitations:—*Held*, on appeal, that assuming the entry to be admissible in evidence, as to which the Court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shewn to be agent of the assignees, and that this could not take the case out of the statute as against the assignees.—S., in 1863 mortgaged other property to A., a client of N. N. paid interest on the mortgage and charged S. with it in account till 1866. After this, N. went on paying interest to A., who believed that it came from S., but it was not shewn that N. had ever acted as solicitor to S. after 1866, nor was there anything shewing that N. was authorized to make the payments as agent for S.:—*Held* (affirming the decision of North, J.), that the payments of interest after 1866 did not take the case out of the Statute of Limitations.—A letter from N. to A. stating that he had paid to A.'s account a sum received from S. for interest, *held* not to be an admission against interest so as to be admissible in evidence to shew payment by S. Newbould *v.* Smith C. A. 127

—— Bill of exchange—Presentation - 612
See Bill of Exchange.

LUNATIC—*Lunacy Regulation Act*, 1853 (16 *& 17 Vict. c.* 70), *s.* 116—*Mortgage of Lunatic's Estate to pay Debts of Ancestor—Covenant on behalf of Lunatic.*] A lunatic was entitled in fee to one moiety of real estate as one of the two co-heiresses of an ancestor who had died intestate. The real estate was liable as assets for payment of a considerable amount of simple contract debts of the ancestor which his personal estate was insufficient to pay. The Court authorized the committee to concur with the other co-heiress in a mortgage of the entirety to raise the amount of the debts, the mortgage being so framed that the lunatic's moiety was only liable for one moiety of the mortgage debt and interest, and could not be made liable for any default of the other co-heiress in payment of the other moiety of the principal and interest, but the Court declined to authorize the committee to enter into any covenant on behalf of the lunatic. *In re* Fox - - C. A. 37

—— Vesting order—Trustee Act - - 416
See Trustee Acts. 3.

MAINTENANCE—Infant - - - 397
See Infant. 1.

MANSION HOUSE—Sale of - - 429
See Settled Land Act.

MERGER—Right of way - - - 420
See Way.

METROPOLIS MANAGEMENT ACTS, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 68, 73, 74, 75, 76, 250—*Metro-*

METROPOLIS MANAGEMENT ACTS—*continued.*

polis Local Management Acts Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 106—"Sewer"—"Drain"—Drainage of contiguous Houses by "Combined Operation"—Notice of Action against District Board.] The owner of a plot of ground within the metropolitan district on which he was about to build fifteen contiguous houses, sent to the local board notice of his intention to lay down upon it a pipe drain running parallel to the houses, through which the houses would be drained into the main sewer belonging to the Metropolitan Board. The local board signified their approval of the scheme by letter and entered their approval in their books, but made no formal order. The owner completed the drain:—*Held*, by North, J., that sect. 74 of the Metropolis Local Management Act, 1855, which enables a district board to order a group or block of contiguous houses to be drained by a "combined operation," is supplemental to sect. 73, and like that section applies only to existing houses—that the local board had therefore no power to make an order for draining by a "combined operation" a set of houses in course of erection, and that if they had, their approval of a scheme proposed by the owner did not amount to an order—that the drain in question was therefore not a "drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and was a "sewer" and not a "drain" within the meaning of sect. 250, and by virtue of sect. 68 vested in the local board:—*Held*, on appeal, by Cotton and Lindley, L.JJ., *dissentiente* Lopes, L.J., that although sect. 74 did not give the board power to order drainage by a combined operation except in the case of existing houses, the general words of sect. 76 gave them this power in the case of houses about to be built; that their approval of the scheme was an order, and that the drain in question was therefore a "drain" and not a "sewer" within the meaning of sect. 250, and did not vest in the local board:—*Held*, by North, J., that sect. 106 of the Metropolis Local Management Acts Amendment Act, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity:—*Held*, by Lopes, L.J. (Cotton and Lindley, L.JJ., not dissenting), that that section does not apply to an action for an injunction to restrain a nuisance. Bateman *v.* Poplar District Board of Works - - C. A. 360

MINE—*Settled Estate—Coals won by innocent Trespassers—Coals required for Support of Railway—Compensation Moneys—Capital or Income—Successive Tenants for Life—Remainderman.*] Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for the Defendant for life without impeachment of waste, with remainders over.—During the life, and also after the death of B., part of these minerals were won by instroke by the owners of adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—*Held*, that the moneys paid in respect of the minerals so won during the respective lives of B. and the Defendant, belonged to the estate of

MINE—*continued.*

B. and to the Defendant respectively.—The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B., the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—*Held*, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the Defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under the 74th section of the Lands Clauses Consolidation Act, 1845. *In re* Barrington. Gamlen *v.* Lyon - C. A. 523

—— Mortgage—Accounts - - - 226
See Mortgage. 2.

—— Reservation of minerals—Prehistoric boat
See Landlord and Tenant. [562

—— Right of working—Owner of land adjoining railway - - - - 632
See Railway Company. 1.

MISCONDUCT OF HUSBAND—Equity to a settlement - - - - - 220
See Settlement. 2.

MISTAKE—Omission in will - - 198
See Will. 2.

—— Payments by executor—Liability to refund
See Executor. 1. [552

—— Release - - - - - 300
See Settlement. 1.

MORTGAGE—*Consolidation—First Mortgagee—Subsequent Mortgage—New Mortgage—Equity—Assignee.*] A brewery company were first mortgagees for £1000, and the Plaintiff was third mortgagee, of a public-house, A. The company afterwards took a mortgage of a public-house, B., A. and B. both belonging to the same mortgagor. The lease of A. was nearly out, and by arrangement between all parties the company advanced £1000 for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the brewery company to secure £2000 and advances, and subject thereto to the Plaintiff. By a memorandum given at the same time the Plaintiff declared that the company was to have priority for their £2000 and advances, not to exceed in the whole £2300. The brewery company afterwards transferred both mortgagees to the Defendant.—The Plaintiff claimed to redeem A., to which the Defendant objected unless the Plaintiff also redeemed B.:—*Held*, that though the new mortgage of A. to the Plaintiff was in date subsequent to the mortgage of B. the intention of the parties was merely to give priority to the company for their £2300 and not to give the company a right to consolidate the mortgage on A. and the mortgage on B.; and as the whole was equitable the company could not be held to have obtained any such right; nor could their assignee be in any better position. Bird *v.* Wenn 215

MORTGAGE—*continued.*

2. —— *Foreclosure—Mortgage of Coal Mines—Mortgagee in Possession—Accounts—Value of Coal improperly worked—Deductions—Costs of Severance—Costs of Raising—Damage to Mines subsequent to Foreclosure Judgment—Adding Accounts and Inquiries after Judgment—Rules of Supreme Court*, 1883 *Order XXXIII. r.* 2.] The Plaintiffs were mortgagees in possession of a colliery, and were also treated by the Court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery and gave their sublessees permission to work and remove the pillars, which they did:—*Held*, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sublessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; and the foreclosure, which had been made absolute before the appeal was heard, was reopened.—*Livingstone* v. *Rawyards Coal Company* (5 App. Cas. 25) distinguished.—Some time after judgment *nisi* for foreclosure, which directed accounts against the Plaintiffs as mortgagees in possession, but contained no inquiry or direction as to improper working of the collieries, it was discovered that the mines had been flooded in consequence, as the mortgagors alleged, of the improper working of the mortgagees or their sublessees in removing the pillars.—The mortgagors applied to have under the foreclosure judgment as it stood an inquiry with reference to the flooding, and to charge the mortgagees with the injury so caused:—*Held* (reversing Bacon, V.C.), that although the application was wrong in form, as such an inquiry should have been obtained through a supplemental judgment, or by an addition to the existing judgment, yet as a probable case had been made out of serious damage to the mortgaged property by the acts of the mortgagees in possession, the mortgagors should not be absolutely foreclosed and left to the remedy of an action against the mortgagees, or on the covenants of the lease against the lessees, but were entitled to such an inquiry, and in taking the accounts to charge the mortgagees with the amount of the injury;—And the Court, in order to settle the question cheaply and expeditiously, directed a reference to ascertain whether the flooding had been caused by the improper working by the mortgagees or lessees or any persons acting by their permission—and if so what was the amount of loss or damage caused thereby—and added a direction that the mortgagees, in taking the accounts directed by the foreclosure judgment, should be charged with the amount of such loss or damage. Taylor *v.* Mostyn - - - - - 226

3. —— *Mortgagee in Possession—Block of Residential Apartments—Power to manage.*] A mortgage of a large block of buildings, let out as residential apartments, contained an assignment of "the rents and profits" and a power to the mortgagees to enter on the premises in default of payment and "manage" and receive the rents and profits thereof. The deed contained no assignment of chattels nor any reference to existing arrangements with tenants, but the mortgagor covenanted to pay moneys expended by the mortgagees for any of the purposes thereby authorized. The block of buildings contained a common kitchen and *salle à manger* for the use of the inmates, and at the date of the mortgage the apartments were let to tenants under various agreements (made by a former mortgagee who had been paid off) by some of which the tenants stipulated for attendance and a supply of cooked food according to a tariff fixed by the manager. The interest being in arrear the mortgagees took possession of the building and continued to supply the tenants, whether they had special agreements or not, with attendance and cooked food, and managed the building at a loss. An action having been brought by the second mortgagee for an account:—*Held* (affirming the decision of Kay, J.), that the first mortgagees were entitled in taking the accounts to be allowed the losses sustained by them in the management, not only out of the rents of the property, but out of the surplus proceeds of the sale of the property. Bompas *v.* King 279

4. —— *Priority—Deposit—Negligence.*] On the 18th of January, 1883, A., a solicitor, obtained from his sisters, B. and C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 and payment to them of £300, they conveyed their shares of freehold property, which was subject to a mortgage to K., to A. in fee. No money was at the time due from B. and C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. and C., who had no idea that they were thereby conveying their property, and signed in full reliance on A.'s statement that he was going to clear off the mortgage and wanted to send the deeds to K.—On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. and C., who were joint owners with himself of the property, were going to convey and "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solicitor of the bank and merely told him that he was to exercise great care and diligence in investigating the title. The solicitor being dead, it did not appear what inquiries were made by him, but the advance was made to A.—A. having absconded, the property was claimed by the bank as equitable mortgagees, and the claim was resisted by B. and C. on the ground that the conveyances, having been obtained by fraud and misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. and C., of the 18th of January, 1883, which were attested but did not bear a seal, and which had only been discovered amongst A.'s

MORTGAGE—*continued.*

papers after he absconded:—*Held*, that inasmuch as B. and C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of the 18th of January, 1883, were not void but voidable only. But as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud and to a refusal of the advance, and therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. and C.—The rule that the Court will not postpone a legal mortgagee to a subsequent equitable mortgage on the ground of any mere carelessness or want of prudence (see *Northern Counties of England Fire Insurance Co.* v. *Whipp* (26 Ch. D. 482)) does not apply as between two equitable claims:—*Held*, also, that the absence of a seal from the deeds of reconveyance—there being no evidence that they had ever been sealed—rendered them invalid.—*In re Sandilands* (Law Rep. 6 C. P. 411) considered. NATIONAL PROVINCIAL BANK OF ENGLAND *v.* JACKSON - - - - C. A. 1

—— Brickfields—Valuation of houses—Liability of trustees - - - - 347
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PARTNERSHIP—*Loan on Bond to a Trader—Lender receiving Share of Profits nominally as Salary—Substitution of New Agreement—Partnership Law Amendment (Bovill's) Act* (28 & 29 *Vict. c.* 86), *ss.* 1, 2, 5.] In September, 1882, a loan was made to a trader on his bond, the agreement in writing being that the lender should receive interest at £5 per cent. and one-half of the profits of the business of the trader for three years; be instructed in the business; and at the end of that time the lender had an option to be admitted a partner. In October, 1883, the agreement of 1882 was cancelled, and another entered into that the lender should receive £20 a month as interest on the loan in lieu of the former interest and share of profits. The borrower became insolvent in 1886, and executed a deed of trust for the benefit of his creditors:—*Held*, that the claim of the lender came within the provisions of sects. 1 and 5 of the Partnership Law Amendment (Bovill's) Act, 28 & 29 Vict. c. 86, and must be postponed until the debts of the other creditors had been satisfied. *In re* STONE - - 541

PATENT—*Action — Application at Trial for Amendment of Particulars of Objection.*] During the trial of a patent action, after the examination and cross-examination of the Plaintiff had been concluded, the Defendant asked for leave to apply for the postponement of the trial and to amend the particulars of objection, alleging that since the conclusion of the cross-examination he had discovered new facts shewing that the alleged invention was not new at the date of the patent. No affidavit was tendered in support of the application, but the Defendant asked to be allowed to recall the Plaintiff or to go into the box himself to prove the new facts:—*Held*, that the application must be refused.—*Renard* v. *Levinstein* (13 W. R. 229; 11 L. T. (N.S.) 505) distinguished. MOSS *v.* MALINGS - - - - - 603

2. —— *Threats of Legal Proceedings—Validity of Defendant's Patent — Infringement — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 26, 29, 32, 46.] In an action commenced under sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, for an injunction to restrain a patentee from issuing threats of legal proceedings, the validity of the patent cannot be tried, the only issue in such an action being infringement or no infringement.—So, where in an action commenced under the above section, the Plaintiffs in their statement of claim alleged that the Defendants' patent was invalid, such allegation was ordered to be struck out. KURTZ *v.* SPENCE 579

PAUPER—Appeal in formâ pauperis - 265
See PRACTICE. 2.

PER STIRPES OR PER CAPITA - - 98
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PERPETUITY—Trust to repair tomb - 187
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POWER—Of sale—Mortgage—Unusual form 111
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—— To appoint new trustees - - 599
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PRACTICE—*Appeal for Costs—Mortgagee—Appeal by Mortgagor—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.] Although a mortgagee who has been deprived of his costs on the ground of misconduct may appeal from the order of the Judge, yet if the Judge, notwithstanding charges of misconduct, allows a mortgagee his costs, the mortgagor has no right of appeal; because the fact of the misconduct, if proved, would bring the costs within the discretion of the Judge. Charles *v.* Jones - - - - - **C. A. 80**

2. —— *Appeal in formâ pauperis—Rules of Supreme Court*, 1883, *Order* XVI., *rr.* 22, 23, 24.] Where a party who has not sued or defended as a pauper in the Court below applies for leave to appeal in formâ pauperis, the Court will follow by analogy Order XVI., rr. 22, 23, and 24, and not the old practice as to such appeals.—A married woman suing without a next friend, her husband not being a party, applied for leave to appeal in formâ pauperis:—*Held*, that her husband as well as herself must make the affidavit required by rule 22. *In re* Roberts. Kiff *v.* Roberts **[C. A. 265**

3. —— *Default—Action to perpetuate Testimony—Default in Delivery of Defence—Leave to proceed as if Pleadings closed.*] In an action to perpetuate testimony, the time for delivery of defence having expired, and the Defendant not having applied for an extension of time, the Plaintiff obtained, on motion, an order that the action might proceed notwithstanding the Defendant's default, and that he might be at liberty to examine the witnesses (one of whom was of advanced age and in failing health) as if the pleadings were closed. Marquess of Bute *v.* James - - - - - - **157**

4. —— *Costs—Next Friend — Solicitor and Client—Reversion.*] When the costs of infant Plaintiffs suing by their next friend are directed to be paid out of a fund in Court to which the infants are entitled in reversion, party and party costs only will be immediately paid; the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client when the fund comes into possession. Damant *v.* Hennell - - - **224**

5. —— *Costs paid to Solicitor—Reversal on Appeal—Order to refund Costs.*] An action being dismissed at the hearing with costs, a sum of money which had been paid into Court as security for the Defendants' costs was ordered to be paid out to the solicitors for the Defendants in part payment of the Defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the Defendants. The Plaintiffs asked for an order against the Defendants' solicitors for repayment by them:—*Held*, that the Court had no jurisdiction on the appeal to order the Defendants' solicitors to refund the money, the solicitors not being present. Nor, *semble*, could such an order have been made if they had been served with notice of the application. Lydney and Wigpool Iron Ore Company *v.* Bird - - - - - **C. A. 85**

PRACTICE—*continued.*

6. —— *Evidence—Special Examiner—Country Examination—Foreign Language.*] It is not now the practice of the Court to appoint a Special Examiner to take a country examination, even, for instance, in a Welsh case where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language. In such a case the examination will be referred in the usual way to one of the Examiners of the Court, who is entitled, if necessary, to the assistance of an interpreter. Marquess of Bute *v.* James - - - - **157**

7. —— *Production of Deeds—Action for Recovery of Land—Discovery—Purchaser for Value without Notice—Privilege—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 2.] An action of ejectment was brought in the Chancery Division by a devisee to recover possession of land. The Defendants, by their statement of defence, pleaded (1) possession; (2) purchase for value without notice. By their affidavit of documents they objected to production of certain documents on the ground that they were purchasers for value without notice, and as to some of them on the further ground that they did not prove or tend to prove the case or title of the Plaintiffs. The Plaintiffs applied for production:—*Held*, by Chitty, J., that under the Judicature Act, 1873, sect. 24, sub-sect. 2, the Defendants stood in the same position as they would have been in if a bill of discovery had under the old practice been filed against them, and that production ought not to be ordered.—*Held*, on appeal, that the case was not analogous to that of a bill for discovery met by a plea of purchase for value without notice—that the action was one for relief, and as the Defendants by pleading possession had put the Plaintiff to proof of her title, she had the ordinary right of a plaintiff to discovery of matters tending to support her title, and that the Defendants could not resist production on the ground that they were purchasers for value without notice:—But, *held*, that those documents which were sworn not to prove or tend to prove the Plaintiff's case were sufficiently protected, though the affidavit did not go on to say that they did not contain anything to impeach the title of the Defendants. Emmerson *v.* Ind, Coope & Co. **[C. A. 323**

8. —— *Sale of Real Estate—"Cause or matter relating to real estate"—Rules of Supreme Court*, 1883, *Order* LI., *r.* 1.] An action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate and of the rents and profits of the real estate received by the Defendant. The action came on for hearing on motion for judgment, and the Court was asked under rule 1 of Order LI. to make an order for the sale of the real estate. The Defendant did not object:—*Held*, that this was not "a cause or matter relating to real estate" within the meaning of the rule, and that the Court could not order a sale under that rule.—But, upon a sum-

PRACTICE—*continued.*
mons under the Settled Land Act, a sale was ordered. *In re* STAINES. STAINES *v.* STAINES [172

9. —— *Security for Costs of Appeal.*] Notice of appeal from dismissal of an action was served by the Plaintiff on the 1st of March. On the 5th of June a defendant gave notice of motion for security for costs, supporting it by an affidavit that on the 1st of June writs of fi. fa. for costs payable to him by the Appellant had been issued to which the sheriff returned nulla bona; but the affidavit did not state that the applicant had not up to that time any reasonable evidence of the Appellant's insolvency. The Appellant's briefs had been delivered and the fees paid on the 22nd of May, and on the 10th of June, when the application was heard, the appeal was only two out of the paper:—*Held*, that although there was such evidence of insolvency that an order for security would have been made if applied for in due time, the application must be refused as having been made too late, when the Appellant had incurred all the costs of the appeal, though it might even then have been granted if the applicant had shewn that until the return of nulla bona he had no reasonable evidence of the Appellant's insolvency. POOLEY'S TRUSTEE *v.* WHETHAM C. A. 76

10. —— *Service of Writ — Rules of Supreme Court*, 1883, *Order* IX., *r.* 6—*Firm—Place of Business—Agent.*] Defendants were a Scotch firm, having an agent within the jurisdiction whose authority did not extend to taking orders; the name of the firm was affixed to the agent's offices: —*Held*, that the offices of the agent were not a place of business of the firm for the purpose of serving the writ. BAILLIE *v.* GOODWIN & CO. 604

11. —— *Service of Writ — Foreign Corporation — London Agency — Waiver.*] In an action against a foreign bank, service of the writ of summons on the head manager of the London "Agency" of the bank—the agency being ostensibly and in fact a bank with the usual offices, managers, and staff of clerks—*held* to be good service on the Defendants:—*Held*, also, that an application made by the Defendants for security for costs constituted a waiver of any objection as to service. LHONEUX, LIMON & CO. *v.* HONG KONG AND SHANGHAI BANKING CORPORATION 446

12. —— *Service of Writ out of Jurisdiction—Action relating to Real Estate abroad—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*g*).] In an action to enforce against real estate in Trinidad the trusts of a creditors' deed (which had been established by a former suit in the Court of Chancery), the Defendants were persons in whom the legal estate was outstanding, one of them being a British subject resident in Trinidad. The other Defendants resided in England. An opinion was given by a barrister practising in Trinidad that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those Defendants who were in England:—*Held*, that leave could be given to serve the writ on the Defendant who was in Trinidad. JENNEY *v.* MACKINTOSH - - - - 595

13. —— *Third-party Procedure—Claim of Indemnity—Indemnity after Service of Writ—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48.] Leave may be given to a defendant to serve notice of claim for indemnity on a third party, under Rules of Supreme Court, 1883, Order XVI., r. 48, whether the indemnity has been given after or before action brought.—On the application for leave the Court will not go into any question as to the merits of the action or the validity of the claim for indemnity. EDISON AND SWAN UNITED ELECTRIC LIGHT COMPANY *v.* HOLLAND - - 497

14. —— *Trial — Place of Trial — Amended Statement of Claim—Rules of Supreme Court*, 1883, *Order* XXVIII., *r.* 2; *Order* XXXVI., *r.* 1.] A Plaintiff who wishes to name some place other than Middlesex as the place of trial must name it in the original statement of claim. If he omits to do so he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim he cannot alter it in an amended statement of claim. LOCKE *v.* WHITE - - - - C. A. 308

—— Accounts after judgment - - 226
See MORTGAGE. 2.

—— Taxation of costs - - - 266
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—— Winding-up of company - - 314
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PRESCRIPTION—Light - - 238, 471
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PRESENTATION—Bill of exchange - 612
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PRINCIPAL AND AGENT—Payment of interest by - - - - - 127
See LIMITATIONS, STATUTE OF.

PRINCIPAL AND SURETY — *Satisfaction of Judgment by Surety — Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97, *s.* 5.] The right of a co-surety under 19 & 20 Vict. c. 97, who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstance that such surety has not obtained actual assignment of the judgment. *In re* M'MYN. LIGHTBOWN *v.* M'MYN - 575

PRINTING—Cost of—Application of company's funds - - - - 528
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PRIORITY—Mortgage - - - 1
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PRODUCTION OF DEEDS - - - 323
See PRACTICE. 7.

PROFITS—Share of—Loan to trader - 541
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PROXIES—Cost of printing—Application of company's funds - - - 528
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PURCHASE-MONEY—Lands Clauses Act—Reinvestment - - - - 609
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PURCHASER WITHOUT NOTICE—Priority—Negligence - - - - 402
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—— Production of deeds - - - 323
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RAILWAY COMPANY—*Railways Clauses Act*, 1845, *ss.* 79, 80, 81—*Minerals—Owner of adjoining Land—Way of Necessity—Communication—Crossing Railway—Open Workings.*] A railway company under the powers of a special Act and of the Railways Clauses Act, 1845, bought a piece of land on part of which they made three railways, leaving the rest of the land within the triangle formed by the railways, except two small pieces on the west of their lines. The landowner from whom they bought owned the adjoining land on the east. This he afterwards sold, but acquired a right of way over it. He had also bought the two severed pieces on the west. The conveyances to the railway company did not include the minerals under the land.—*Held*, that as under the special Act and under sect. 80 of the Railways Clauses Act, the landowner when he sold the land was entitled to make passages under the railway from his land on the east, no right of way over the railway for the purpose of working the minerals would be implied, and that he had not now such right of way:—*Held*, that being neither "owner, lessee, or occupier" of the land to the east, he had no right, under sect. 79 of the Railways Clauses Act, to work the minerals on the land within the triangle by means of passages under the railway; but he might work the minerals from the pieces of land on the west, and under sect. 81 get compensation for extra expenses.—*Held*, that under sect. 79 of the Railways Clauses Act the owner of the minerals might, having lawfully made a communication with the land sold to the railway company, work the minerals by open workings, that being the usual mode of working such minerals in the district where the same were situate. Midland Railway Company *v.* Miles - - - - 632

2. —— *Unpaid Vendor — Lien — Injunction.*] Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, and an order has been made in such action that the Defendants should on or before a day named pay the purchase-money and interest, with a declaration that the Plaintiff was entitled to a lien on the lands in respect of the purchase-money, interest, and costs, and that in default of payment the Plaintiff was to be at liberty to apply to enforce such lien, such order containing no order for sale, the Court will on default in payment, there being evidence that the land is unsaleable, grant an injunction to restrain the Defendants from running trains over the railway and from continuing in possession of the land.—*Williams* v. *Aylesbury and Buckingham Railway Company* (28 L. T. (N.S.) 547; 21 W. R. 819) and *Munns* v. *Isle of Wight Railway Company* (Law Rep. 5 Ch. 414) discussed. Allgood *v.* Merrybent and Darlington Railway Company - - - - - - 571

RATIFICATION—Contract—Trustee for intended company - - - - 16
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See Estoppel.

RIPARIAN PROPRIETOR—Grant of land—Intention to pass half the bed - 133
See River.

RIVER—*Riparian Proprietor—Grant of Land adjoining River—Intention to pass half the Bed of the River.*] Though the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which shew that the parties must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, shew it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river.—M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7752. The deed contained various reservations for the benefit of M., but contained nothing express to shew whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The Plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the Plaintiffs:—*Held*, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass:—*Held*, also, that a stipulation in the grant that nothing therein contained should prejudice or affect M.'s right to take tolls over his bridge did not preclude L.'s taking away custom from that bridge by the erection of a new bridge.—The conveyance reserved to M.,

RIVER—*continued.*
his heirs, &c., the right of entering upon the land or any part thereof for the purpose of repairing M.'s bridge. *Held*, that this did not preclude L. from erecting any structures upon the land, provided he left reasonable access for the purpose of repairing the bridge. Mickleth wait *v.* Newlay Bridge Company - - - C. A. 133

RULES OF SUPREME COURT, 1883, Order IX.,
r. 6 - - - - - 604
See Practice. 10.
—— Order XI., r. 1 (*g*) - - - 595
See Practice. 12.
—— Order XVI., rr. 22, 23, 24 - - 265
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—— ——, r. 48 - - - - 497
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—— Order XXVIII., r. 2 - - - 308
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—— Order LI., r. 1 - - - - 172
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SALE—Order of Court—"Cause relating to real estate" - - - - 172
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SECURITY FOR COSTS - - - 76
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SERVICE—Foreign corporation - - 446
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See Practice. 12.

SETTLED ESTATES ACT—*Settled Estate—Lease—Sanction of Court—Covenant to renew Lease at future Time—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *ss.* 4, 5—*Power to appoint Trustees—Exercise—Recital in Deed.*] The Court has no power under sects. 4 and 5 of the Settled Estates Act, 1877, to sanction a sub-lease of settled land (held under a renewable lease) for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not be a lease taking effect in possession.—A will contained a power for the trustees or trustee thereof to appoint new trustees. The trust property comprised a renewable lease. After the death of the testator a renewal of the lease was granted to four persons who had not been appointed trustees of the will, but who in the lease granted to them were described as "the present trustees" of the will. The surviving trustee and executor of the will was a party to this deed, and the demise was expressed to be made by his direction:—*Held*, on the authority of *Poulson* v. *Wellington* (2 P. Wms. 533), that this statement in the renewed lease operated as an appointment of the four lessees to be trustees of the will. *In re* Farnell's Settled Estates - - - - - 599

SETTLED LAND ACT (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 50—*Tenant for Life—Sale of Mansion-house and Park—Assignees of Tenant for Life—Consent.*] The Court, in the exercise of the discretion given by sect. 15 of the Settled Land Act, in respect to ordering a sale of the mansion-house and park on the settled land where the trustees of the settlement do not consent, will not, where the tenant for life has mortgaged his life interest to its full value, make the order on his application without full information as to the proposed sale and the consent of the mortgagees. *In re* Sebright's Settled Estates - - C. A. 429
—— Powers of investment—Debentures of local authority - - - - 455
See Settlement. 4.

SETTLEMENT—*Covenant to settle—Wife's after-acquired Property—Release by Wife in Mistake before Marriage.*] By marriage settlement in 1859, which recited that the wife was absolutely entitled, amongst other property, to £10,000, part of her share of the residue of A.'s estate in the hands of the executors of his will, and secured by a mortgage, and that it had been agreed that the intended husband and wife should enter into covenants for the settlement of the future real and personal estate of the intended wife, this £10,000 was settled, and the husband and wife, in pursuance of the said recited agreement, covenanted with the trustee for the settlement of all the estate, property and effects, exceeding £300 at one time, which the husband and wife, or either of them in her right, should at any time or times subsequent to the marriage and during the coverture become seised or possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement the intended wife, then *sui juris*, had, in consideration of the payment of £10,500, executed to the executors of A.'s will a general release of all her claims as residuary legatee. The release was executed by the intended wife without independent advice, and in ignorance that her share of residue was worth considerably more than £10,500.—On the 10th of February, 1885, while the coverture was still subsisting, an order setting aside the release was made by the Court of Appeal (31 Ch. D. 1):—*Held*, that the covenant to settle after-acquired property did not apply to any existing property to which the wife was entitled at the moment of marriage other than the £10,000; but (reversing Kay, J. (31 Ch. D. 648)) that the setting aside the release of 1859 did not confer any new title, but merely removed a bar to the assertion of a pre-existing title, and accordingly that the additional residuary property could not be treated as first acquired when the release was set aside, so as to be bound by the covenant.—*Williams* v. *Mercier* (10 App. Cas. 1) distinguished. *In re* Garnett. Robinson *v.* Gandy - - - - - C. A. 300

2. —— *Equity to a Settlement Husband and Wife—Misconduct—Whole Fund.*] A wife was entitled to about £1500. The husband had dis-

SETTLEMENT—*continued.*
regarded an order of the Court for restitution of conjugal rights, and stated that he and his wife should not again live together:—*Held*, that the conduct of the husband amounted to aggravated misconduct, and that under all the circumstances of the case the whole fund was to be settled on the wife and children. REID *v.* REID - 220

3. —— *Trust to settle Legacy—Will—Form of Settlement.*] A testator bequeathed as follows: "To my daughter A., wife of M. W., I bequeath £10,000. This amount to be settled upon her for her life and to be invested for her in good securities in the names of two or more trustees. At her death £8000 of the above sum to be divided equally amongst her children, and the remaining £2000 to be given to her husband if living; if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the Court to a settlement of the legacy. Bacon, V.C., held a settlement unnecessary, and ordered that the fund should be paid into Court and the income paid to the daughter for life, with liberty to apply on her death; and he ordered the executrix to pay the costs out of the residue:—*Held*, on appeal, that a settlement ought to be directed, treating the directions in the will as instructions for a settlement:—*Held*, on the construction of the will, that the settlement must be so framed as to make the contingent gift of £2000 to "her husband if living" apply only to M. W. and not to any future husband, and so as to confine the trusts in favour of the daughter's children to her children by him:—*Held*, further, that the settlement ought to be framed so as to restrain the daughter from anticipating the income, and so as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry, and that it ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or her next of kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the direction for equal division.—*Oliver* v. *Oliver* (10 Ch. D. 765) distinguished.—*Held*, that the costs ought to be paid out of the legacy and not out of the residuary estate. *In re* PARROTT. WALTER *v.* PARROTT - - - - C. A. 274

4. —— *Trust to settle—Will—Money to be laid out in the purchase of Land to be settled in Strict Settlement—Investment—Debentures or Debenture Stock—Local Authority—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 33—*Local Loans Act*, 1875 (38 & 39 *Vict. c.* 83), *s* 27.] A testator, having devised his real estate to A. for life with remainder to his issue in tail, gave his personal estate to trustees upon trust to convert the same into money, and to lay out the produce in the purchase of freehold lands in Ireland to be settled to uses corresponding with the limitations of the real estate.—Upon an originating summons by the trustees, one of whom was the tenant for life, for the direction of the Court, it appearing that Irish land was at present an unsafe investment:—*Held*, that the trustees might defer purchasing

SETTLEMENT—*continued.*
Irish land until they could prudently do so, and might in the meantime invest the personal estate under the powers of sects. 21 & 33 of the Settled Land Act, 1882.—Trustees whose powers of investment are dependent on sect. 21 of the Settled Land Act, 1882, authorizing trustees to invest capital trust money in the debentures or debenture stock of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares," may not invest, under the powers of sect. 27 of the Local Loans Act, 1875, in debentures or debenture stock issued by a local authority under that Act, unless, *quære*, the local authority has for ten years paid a dividend. *In re* MABERLY. MABERLY *v.* MABERLY - - - - 455

—— Infants' Settlement Act - - 482
See INFANT. 2.

SEVERANCE—Costs of—Mine - - 226
See MORTGAGE. 2.

SEWER—Metropolis Management Acts - 360
See METROPOLIS MANAGEMENT ACTS.

SOLICITOR—*Bill of Costs—Taxation—Costs of Preparation of Lease and Agreement for Lease—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2; *Schedule I., Part II.*] The scale fee prescribed by Part II. of Schedule I. to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee.—Decision of Pearson, J., affirmed.—An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, and that, on the lessor complying with these conditions, the lessor should grant and the lessee accept a lease in the form thereto annexed:—*Held*, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of rule 2 of the General Order, and could not be separately charged for.—"Agreements for leases" in Schedule I., Part II., mean agreements for leases intended to be relied on as regulating the tenancy without any formal lease and the scale fee is payable in respect of them. *In re* EMANUEL & SIMMONDS - C. A. 40

2. —— *Bill of Costs—Taxation—Refresher Fees—Consultation Fees—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-s.* 48—*Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 17—*Interest on Disbursements.*] The special allowances and scale of fees mentioned in Rules of Supreme Court, 1883, Order LXV., rule 27, sub-sect. 48, are applicable to all taxations, whether in an action in the Supreme

Court, or under the common order, or under a special order obtained by a client against his solicitor under the jurisdiction given by the Solicitors Act, 1843 (6 & 7 Vict. c. 73).—But Order LXV., rule 27, sub-sect. 48, does not prevent the client from giving the solicitor authority, which may be express or implied to employ a particular leader, and to give him such special fees by way of refresher or otherwise, though of far larger amount than the maximum fixed by sub-sect. 48, as may be necessary to secure his services. And such authority having been shewn by the evidence to have been clearly and distinctly given by the clients (a board of directors) to their solicitor:—*Held* (reversing the decision of Pearson, J.), that the Taxing Master was not precluded from allowing more than the maximum scale fee fixed by sub-sect. 48, and that he must exercise his discretion as to the *quantum*, having regard to the authority given by the clients to their solicitor.—There is no recognised rule that where special fees have been paid to the leader, the fees paid to his juniors must be according to the same rate; and, accordingly, in the absence of proof that the clients had authorized payment of special refresher fees to the junior counsel proportionate to those paid to the leader, the disallowance by the Taxing Master of special refresher fees to the junior counsel was upheld.—Although the case was one of very great magnitude and complication, and occupied twenty-nine days, the Court declined to interfere with the discretion of the Taxing Master in disallowing extra fees paid by the solicitor to his counsel for consultations.—*Held*, also (*per* Pearson, J.), that a solicitor who has made disbursements for his client, and who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under sect. 17 of the Solicitors Act, 1870, claim interest on the disbursements. *In re* Harrison - - C. A. 52

3. —— *Bill of Costs—Taxation—Objections, Notice of Consideration of, by Taxing Master—Charge on Fund recovered by Solicitor—Costs of Proceedings to dispute Retainer—Costs of Appeal subsequent to Charging Order—23 & 24 Vict. c. 127, s. 28.*] Objections carried in to the taxation of costs should shew the ground on which the items questioned are objected to.—Objections to the taxation of a bill of costs were lodged, and a warrant to consider them was issued on the 4th of December. On the same day the solicitor who lodged the objections received from the Taxing Master at 4.30 P.M. a notice that he had appointed 1 o'clock on the following day to consider them:—*Held*, that the notice was, under the circumstances, sufficient.—By an order of the Court the costs "properly incurred" by the Plaintiff's solicitor "in recovering" a fund were directed to be taxed:—*Held*, that the costs incurred by the solicitor in establishing against the Plaintiff his retainer as solicitor in the matter were rightly included in the taxation.—After the date of the order directing the taxation, an appeal by the Defendant against the order by which the retainer of the Plaintiff's solicitor was established came on for hearing, and was dismissed, and the Taxing Master included in the taxation already directed the costs of the Plaintiff's solicitor of this appeal:—*Held*, that such costs, although incurred subsequently to the date of the direction for taxation, being costs incurred in resisting the continuation of the attempt to destroy the proceedings by which the fund had been recovered were properly included in the taxation.—Decision of Kay, J., affirmed. *In re* Hill - - - C. A. 266

4. —— *Money left in Hands of Solicitor for Investment—Mortgage—Outstanding Legal Estate—Conflicting Equities—Priority—Negligence—Purchaser for Value without Notice.*] A client left moneys for investment in the hands of his solicitors.—The solicitors represented that the sum of £11,000, part of these moneys, was invested on mortgage of freehold property at A., belonging to a firm, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for £55,000 upon property X. at A., belonging to the firm, and they repaid themselves £11,000 of the £55,000 with the client's money.—The firm afterwards bought property Y. at A., and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of £55,000 on property X., and took from them a mortgage for £50,000 on properties X. and Y., subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client:—*Held*, first, that the solicitors must be treated as having become trustees for the client of £11,000 out of the £55,000 secured by mortgage on property X.; and having improperly as against the client given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for £11,000 and interest upon property Y. (in which the legal estate was outstanding) as well as upon property X.:—*Held*, secondly, that there had been under the circumstances no such negligence or want of prudence on the part of the client as to postpone him, and that he was entitled in priority to the limited company to a charge on property Y. in which the legal estate was outstanding.—The decision of Bacon, V.C., affirmed.—*Waldron* v. *Sloper* (1 Drew. 193) distinguished. *In re* Vernon, Ewens & Co. C. A. 402

5. —— *Mortgage by Client to Solicitor—Unusual Provisions—Power of Sale on Default without Notice—Duty of Solicitor to explain Provisions.*] In April, 1879, P. owed £450 to his solicitor, K., who was pressing for payment. On the 11th of April, 1879, he gave K. his promissory note for £466 17*s.* 10*d.*, payable three months after date, and on the 31st of May signed an agreement to mortgage to K. his interest in a railway for the £466 17*s.* 10*d.* The agreement contained a provision that, if that sum was not paid on the 11th of July, K. should be at liberty to sell the property without notice. The agreement was drawn by K., and P. had no independent advice. Default having been made, K. sold without giving such notice as is required in the common form of power of sale:—*Held*, by Pearson, J., and by the Court

SOLICITOR—*continued.*

of Appeal, that, as this was not an ordinary mortgage transaction, but an arrangement for giving the client time for payment of a debt presently payable, the doctrine of *Cockburn* v. *Edwards* (18 Ch. D. 449) did not apply; that it was not incumbent on K. to explain to P. the unusual form of the power of sale; and that the sale could not be impeached on the ground that it was not authorized by the common form of power. POOLEY'S TRUSTEE *v.* WHETHAM - C. A. 111

6. —— *Purchase by Solicitor from Trustee in Client's Bankruptcy—Setting aside Purchase—Concealment of Facts—Obligation to make complete Disclosure to Trustee.*] The obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client.—C. B. L. was, under the will of his mother, entitled to an interest in real estate, but whether for life or absolute was doubtful. He became bankrupt, and a trustee in bankruptcy was appointed. J. D. P., the solicitor of the bankrupt, had as solicitor, and having acted for some years as receiver, acquired an intimate knowledge of the nature and value of the estate. He had in negotiating mortgages for C. B. L. to consider the extent of his interest under the will; had obtained the opinion of counsel that it was for life only; but had himself formed an opinion that it was, probably, absolute, and not as he had described in his correspondence with the parties concerned merely for life; and he also formed an opinion that the estate was more valuable than the rental shewed. He did not disclose his opinion to C. B. L., or to the trustee in bankruptcy, or to his solicitor. He was employed by the bankrupt to negotiate with the trustee for the purchase of his interest for the benefit of his wife and children. In the negotiation, as solicitor and agent for the bankrupt, he found that the trustee could be induced to sell the interest for a very small sum (£77), and he availed himself of his knowledge, and contracted to purchase, secretly, for himself, but in the name of his brother, an interest which, as the Court afterwards, in an action for administration, held, was absolute, and was worth some thousands of pounds. He never suggested to the trustee that he intended to purchase for himself, but gave him and his solicitor to believe that the purchase was on behalf of the bankrupt's family. In an action by a subsequent trustee in bankruptcy to set aside the sale:—*Held*, that the trustee in bankruptcy stood in the place of the bankrupt for the purpose, that the solicitor for the bankrupt could not be allowed to hold as against the trustee an advantage obtained by him in the purchase from him by means of the knowledge which he had gained whilst acting as solicitor for the bankrupt, and that J. D. P. and his brother were trustees for the trustee in bankruptcy and must give up to him every advantage of the purchase. LUDDY'S TRUSTEE *v.* PEARD [500

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9 Geo. 2, c. 36—*Mortmain* - - 332
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18 & 19 Vict. c. 120, ss. 68, 73, 74, 75, 76, 250
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23 & 24 Vict. c. 127, s. 28—*Solicitors* - 266
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25 & 26 Vict. c. 68—*Copyright* - - 546
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THREATENING LEGAL PROCEEDINGS—Patentee - - - - 579
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TIME—Delivery of defence - - - 157
See Practice. 3.

TITLE DEEDS—*Custody of—Deeds relating to two Estates—Claim by Owner of one—Custody of Solicitors of previous Owner of both Estates.*] The owner in fee of an estate gave her title deeds into the possession of her solicitors. She afterwards settled the estate, and under the limitations of the settlement part of the estate became vested, after her death, in the Plaintiffs, and the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solicitors refused to deliver up the deeds to the Plaintiffs:—*Held*, that the Plaintiffs could not recover possession of the deeds from the solicitors without the concurrence of the heir; but that the deeds must be deposited in Court, the Plaintiffs having liberty to inspect and make copies of them. Wright *v.* Robotham - - - C. A. 106

2. —— *Production—Trustee and Cestui que Trust—Trust for Sale.*] Primâ facie, and in the absence of any special circumstances, a cestui que trust, even though he be only interested in

TITLE DEEDS—*continued.*
the proceeds of the sale of land, is entitled to the production and inspection of all title deeds and other documents relating to the trust estate which are in the possession of the trustees.—One cestui que trust can enforce this right against the trustees, without bringing before the Court the other persons beneficially interested in the property when they have no higher right than himself. *In re* Cowin. Cowin *v.* Gravett - - 179

TOLLS—Right to—Erection of new bridge 133
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TOMB—Trust for repair of—Perpetuity - 187
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TRADE-MARK — *Registration* — "*Distinctive Mark*" — *Trade-marks Registration Act*, 1875, *s.* 10.] In 1861 the Plaintiffs registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end. From that time they sold black lead in boxes upon which a black dome was impressed, and they imprinted a dome upon each block of black lead. This they did without regard to the shape of the blocks they sold, and there was evidence that the term "dome black lead" had become known in the trade as denoting black lead of the Plaintiffs' manufacture. In 1877 they registered a black dome as their trade-mark for "black lead." The Plaintiffs having brought an action to restrain infringement of their trade-mark the Defendants applied to have it expunged from the register, and Mr. Justice Pearson ordered it to be expunged on the ground that it was only a representation of the thing sold, which thing everybody was at liberty to make, and therefore was not a good trade-mark:—*Held*, on appeal, that there was no reason why a dome should not be a distinctive mark for black lead, that the evidence shewed it to be in fact distinctive, that it was therefore capable of registration as a trade-mark, and that the decision of Mr. Justice Pearson must be reversed. *In re* James's Trade-mark. James *v.* Soulby - - - - C. A. 392

2. —— *Registration—"Fancy Word"—"Electric"—Patents, Designs, and Trade-marks Act*, 1883, *s.* 64, *sub-s.* 1 (*c*)—*Costs—Comptroller—Unsuccessful Opposition.*] "Electric Velveteen," *held* entitled to registration as a trade-mark under the Patents, Designs, and Trade-marks Act, 1883, "Electric" being a "fancy word" within sect. 64, sub-sect. 1 (*c*), and having acquired an exclusive reputation in the trade prior to the Act.—Where the Comptroller-General of Patents unsuccessfully opposes an application for registration, the Court has no jurisdiction to order him to pay the costs of the applicant, but in the present case it refused to give him any costs. *In re* Leaf, Sons & Co.'s Trade-mark [477

TRADE NAME—Registration - - 546
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TRIAL—Place of - - - - 308
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TRUST—Charitable—Repair of tomb and churchyard - - - - - 187
See Charity. 3.

TRUSTEE—*Foreign Loan—Foreign Government—English Agents—Bondholder—Coupon—Interest—Advertisement—Notice—Deduction for Foreign Tax—Debtor and Creditor—Future Debt—Fund in Hands of Agent for Payment in full—Revocation—Specific Appropriation—Trustee and Cestui que Trust.*] The Defendants were the agents in England of the Egyptian Government for a public loan, and were also mortgagees for the bondholders of certain Egyptian State lands, the management of which was vested in Commissioners, the revenues of the lands being transmitted by the Commissioners to the Defendants for payment of the interest on the loan, and any deficiency being made up out of the general revenues of the Egyptian Government.—On the 12th of April, 1885, the Egyptian Government issued a decree that a tax of 5 per cent. should be retained out of the half-yearly interest payable on the 1st of June then next.—On the 20th of May, the Defendants, having received from the Commissioners a sum of money to meet the half-yearly interest, less the 5 per cent., published, with the authority of the Egyptian Government, an advertisement in the *Times* announcing that the interest due on the 1st of June would be paid by them, the Defendants, between the hours of eleven and two on that day, less the 5 per cent. On the 22nd of May, the Defendants issued a second advertisement, stating that, in consequence of fresh instructions from the Egyptian Government, the interest "would be paid in full." Prior to issuing that advertisement the Defendants had received from the Commissioners a further sum to enable the interest to be paid in full. On the 1st of June the Defendants issued a third advertisement, stating that, in accordance with further instructions from the Egyptian Government, the interest would be paid less the 5 per cent., "notwithstanding that the amount required to pay the same in full has been duly remitted by the Commissioners."—An action by a bondholder claiming payment by the Defendants of the interest in full on the ground that they were "trustees for the bondholders" of the revenues received by them, and that the money remitted to them for payment in full of the interest on the 1st of June had been "specifically appropriated' to that purpose, was dismissed without costs. HENDERSON *v.* ROTHSCHILD - - - - 459

2. —— *Investment—Real Securities—Mortgage of Trade Premises—Brickfield—Valuation of Houses—Return of Income by Tenant for Life—Lien.*] A trustee is bound to conduct the business of the trust with the same care which an ordinary prudent man of business would take, having regard to the interests, both in the present and the future, of those for whom he feels bound to provide or who have a claim on him.—An investment on trade premises, such as freehold brickworks, though it is within the terms of a power to invest on real property, is not a proper investment of trust money, and trustees making such an investment, even on the advice of a competent solicitor and a competent surveyor, will be held liable for any loss.—Trustees who have invested trust funds upon house property are not liable for loss through subsequent depreciation provided the trustees took care, in making the

TRUSTEE—*continued.*

investment, to act upon due inquiry, and a proper valuation and report made by a competent surveyor.—Trustees invested trust money on a hazardous security at 5 per cent., and paid the income to the tenant for life. The security having failed the trustees were ordered to replace the fund with interest at 4 per cent. from the time of the failure of the security:—*Held*, that the tenant for life could not be called upon to return to the trustees 1 per cent., on the ground that the higher interest was due to its being a hazardous security.—Where trust money has been invested on an insufficient security, and the trustees are ordered to replace the fund, the cestuis que trust are entitled to a lien on the security until the fund is replaced.—The judgment of Bacon, V.C., affirmed. *In re* WHITELEY. WHITELEY *v.* LEAROYD - - - - - **C. A. 347**

3. —— *Solicitor-Trustee—Profit Costs.*] E., a partner with T. in a firm of country solicitors, was one of the two trustees of a will containing no power authorizing him to charge for professional services done in relation to the estate.—E. and his co-trustee F. were Respondents to an application for maintenance by a next friend on behalf of an infant, under the summary procedure of the Court, and E.'s firm, through their London agents, acted as solicitors for E. and his co-trustee in the matter, and made profit costs.—E. afterwards became sole trustee, and being made Defendant to an action to carry into execution the trusts of the will, the London agents of his firm acted as his solicitors in the action, and credited his firm with a portion of their profit costs.—During the proceedings in the action, a receiver was appointed, and E.'s firm, by their London agents, acted as solicitors of the receiver, and were paid certain profit costs for so doing:—*Held*, upon the principle that a trustee is bound to check all charges against the estate, and must not place himself in a position where his interest conflicts with his duty, that none of such profit costs ought to be allowed out of the estate to the firm of which E. was a member.—*Cradock* v. *Piper* (1 Mac. & G. 664) commented on and distinguished.—During F.'s lifetime, E. & F. appointed E.'s partner, T., to be steward of a manor which was part of the trust estate, and fees for manorial business were paid by the tenants of the manor to T. as such steward, a share of the profit costs arising from which was claimed by E. E. also claimed a share of certain profit costs paid to his firm by lessees and others in respect of leases and agreements for leases of portions of the trust estate granted by E., and prepared and carried out by him or his firm:—*Held*, that neither E. nor his firm were entitled in either instance to such profit costs, but that E. must account for the same to the trust estate. *In re* CORSELLIS. LAWTON *v.* ELWES - - **160**

—— Appointment of new trustees **103, 414, 416,** *See* TRUSTEE ACTS. 1–4. **[590**

—— Investment—Settled Land Act - **455** *See* SETTLEMENT. 4.

—— Title deeds—Right of cestui que trust—Jurisdiction - - - **179** *See* TITLE DEEDS. 2.

TRUSTEE ACTS — *Lunatic Mortgagee — Trustee Act*, 1850, *ss.* 3, 5, 20—*One of several Mortgagees.*] Sect. 3 of the Trustee Act, 1850, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mortgagee, but extends to the case where he is one of several trustees or mortgagees.—One of two trustees being of unsound mind, a new trustee was appointed in his place under a power:—*Held*, that the Court had jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mortgage, forming part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee. *In re* Jones. *In re* Zincraft's Will Trusts [C. A. 414

2. —— *New Trustee—Decrease in Number of Trustees—Vesting Order—Jurisdiction*—13 & 14 *Vict. c.* 60, *ss.* 32, 34, 35.] Where one of three trustees was an absconding bankrupt, the Court refused, notwithstanding evidence of great difficulty in getting a third person to act as trustee, to appoint the solvent trustees in place of themselves and the bankrupt, and to make an order vesting the trust estate in the solvent trustees alone: on the ground that the Court will not reduce the number of trustees of a continuing trust; and also that there is no power to appoint existing trustees to be new trustees. *In re* Gardiner's Trusts - - - - 590

3. —— *New Trustee*—13 & 14 *Vict. c.* 60, *ss.* 3, 5, 20, 34—*Reappointment by Court of Existing Trustees—Vesting Order—Severance of Joint Tenancy.*] Where there is no doubt that existing trustees of an instrument have been duly constituted, the Court will not reappoint them, with a view to making, under the Trustee Act, 1850, sect. 34, a vesting order which will not sever the joint tenancy.—*In re Pearson* (5 Ch. D. 982) not followed.—A., B., and C. were named trustees in a will, A. died, B. became of unsound mind, and C. appointed E. and F. trustees in the place of A. and B. Part of the trust estate consisted of a mortgage of freeholds. The appointment of E. and F. being unquestionably valid, the Court refused to reappoint them and make an order vesting the mortgage estate in C., E., and F., but made an order appointing C. in the place of B. to convey the mortgaged property for the estate of himself and B. to himself, E., and F. upon the trusts of the will. *In re* Vicat - C. A. 103

4. —— *New Trustee—Reappointment by Court —Vesting Order—Jurisdiction*—13 & 14 *Vict. c.* 60, *ss.* 32, 34, 35.] A new trustee was appointed under a power, in place of a trustee who had become incapable:—*Held*, that there was no jurisdiction under the Trustee Acts to reappoint the new trustee and vest the trust estate in the continuing trustees and the new trustee.—*In re Dalgleish's Settlement* (4 Ch. D. 143) overruled. *In re* Dewhirst's Trusts - - C. A. 416

ULTRÀ VIRES ACT - - - - 528
See Company. 2.

VENDOR—Lien—Railway company - 314
See Railway Company. 2.

VESTING ORDER—Trustee Act 103, 414, 416, 590
See Trustee Acts. 1–4.

WAIVER—Objection as to service - - 446
See Practice. 11.

WASTE—*Foreign Law — Tenant for Life—Ex Contractu—Liability in this Country—Administration Action.*] The possessor of a foreign entailed estate died domiciled in and left property in England.—By the law of the foreign country the possessor of an entail is liable for deterioration whether voluntary or permissive, and entitled to compensation for improvements. After his death the liability and the compensation can be enforced in accordance with a special procedure code as between the representatives of the late possessor's general estate and the successor as representing the entailed estate.—The successor brought a creditor's administration action in England against the English executor, in which it was admitted that some acts of waste had been committed and also some improvements executed by the late possessor, but the particulars were not proved:—*Held*, that the Plaintiff was entitled to an administration judgment and to prove in respect of the alleged permissive as well as voluntary deteriorations, but that the amount of his claim must be subject to a deduction for the value of improvements, and must first be determined in the Courts of the foreign country.—The objection that the claim was analogous to a claim for waste in England and could not be made the ground of an English judgment against the executor except so far, if at all, as it fell within the statute 3 & 4 Will. 4, c. 42, s. 2, held not to apply, because the deteriorations ought to be regarded not as torts like waste, but as breaches of a condition or contractural obligation subject to which the estate was held. Batthyany *v.* Walford - 624

WAY — *Lease — Construction — Grant by Lease —Merger in Reversion.*] In 1820 the co-owners demised for a term of 1000 years a strip of land intersecting their estate for the purpose of making a canal, with a proviso that nothing in the lease contained should prevent the co-owners, their heirs and assigns, from using the demised land, or from granting any wayleaves or roads over the same in like manner as they could or might have used the same in case the lease had not been granted, but so as not to injure the canal. In 1838 the estate was partitioned by deed between A., B., and C., the co-owners, the reversion of part of the canal being conveyed to the use of B., and the abutting lands to A. and C. severally. In 1839 B. conveyed his reversion in that part of the canal to the lessees:—*Held*, on the construction of the lease of 1820, that the right of way across the canal reserved by the lease was a regrant to the lessors as owners of the reversion of the demised land and not to them as owners of the land intersected by the canal; and that accordingly, when by the conveyance by B., in 1839 to the lessee the term became merged in the reversion, the right of A. and C. over the land comprised in that conveyance were thereupon extinguished.—Decision of Pearson, J., affirmed. Lord Dynevor *v.* Tennant - - - - C. A. 420

—— Of necessity—Railway Clauses Act - 528
See Railway Company. 2.

WILL—*Construction — Gift per Stirpes or per Capita.*] A testator gave some houses to trustees upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and to divide the remaining moiety between the children of the one so first dying; and after the decease of the survivor of the testator's children, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who should attain twenty-one in equal shares and proportions:—*Held* (affirming the decision of Pearson, J.), that the proceeds of sale were divisible among the grandchildren per stirpes, and not per capita. *In re* Campbell's Trusts [C. A. 98

2. —— *Construction—Supplying Omission by Inference.*] The principles on which the Court acts in supplying by inference an omission in a will discussed.—An omission may be supplied in the case of independent gifts to strangers, as well as in the case of a series of gifts to children of a testator, or to members of a class.—A testator devised and bequeathed his real and residuary personal estate to trustees, on trust as to one moiety of the personalty and a specific part (being about half in value) of his realty to accumulate the income until B. should attain twenty-five or die, whichever should first happen, in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust to pay the income to B., if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust for B. absolutely in case he should attain twenty-five, and in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of whom, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or, if more than one, the first surviving son of B. who should attain twenty-one. And the testator directed that the second moiety of the personalty and the rest of the realty should be held on trust to accumulate the income until D. should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, and in case that period should expire before either of such events should happen, then upon trust to pay the income to D. (if living) from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely." But in case D. should leave no son him surviving, the property was to be held in trust for R. absolutely.—B. was a stranger in blood to the testator; D. was the testator's nephew. D. attained twenty-five.—*Held*, that, having regard to the whole scheme of the will, an absolute gift of the second moiety to D. at twenty-five must be implied. Mellor *v.* Daintree - - 198

3. —— *Mortgaged Estate — Exoneration — Specific Devise—"Contrary or other intention"—Locke King's Act* (17 & 18 *Vict. c.* 113); 30 & 31 *Vict. c.* 69.] A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely to do with as she thinks proper;" and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage:—*Held*, that the will did not shew any "contrary or intention" within the meaning of Locke King's Act, and that consequently the widow took the house subject to its rateable proportion of the mortgage debt.—*Brownson* v. *Lawrance* (Law Rep. 6 Eq. 1) dissented from.—*Sackville* v. *Smyth* (Law Rep. 17 Eq. 153) and *Gibbins* v. *Eyden* (Law Rep. 7 Eq. 371) followed. *In re* Smith. Hannington *v.* True. Giles *v.* True - 195

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